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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 185.

ASSOCIATION

THE GLOUCESTER FERRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED MARCH 7, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON

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SUPREME COURT OF THE UNITED STATES,

No.

THE GLOUCESTER FERRY COMPANY

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

1 The answer of the Justices of the Supreme Court of the State of Pennsylvania to the Writ of Error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:—

2 DOCKET ENTRIES, COMMON PLEAS.

Among the records of the Court of Common Pleas of Dauphin County, Pennsylvania, to August Term, 1880, No. 459, it is contained as follows, to wit:—

APPEARANCE DOCKET ENTRY, AUGUST TERM, A. D. 1880.

August 19, 1880. Palmer. 459. Jno. G. Johnson	*Commonwealth of Pennsylvania* vs. *The Gloucester Ferry Company.*	Appeal from the settlement of the Auditor-General and State Treasurer.

Aug. 19, 1880. Appeal and specifications and bond filed.
Case stated filed Jan. 5, 1881.

Opinion of Court filed, giving judgment in favor of the defendant. Exit notice.

Feb. 5, 1881. Exceptions filed.

May 9, 1881. Writ of Error from the Supreme Court received and filed.

Certified,

[Seal of the Court of Common Pleas of Dauphin County.]

E. B. MITCHELL,
Prothonotary.

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3 EXCEPTIONS TO THE SETTLEMENT OF THE AUDITOR-GENERAL AND STATE TREASURER OF THE STATE OF PENNSYLVANIA AGAINST "THE GLOUCESTER FERRY COMPANY."

In re THE SETTLEMENT BY THE AUDITOR-GENERAL AND STATE TREASURER, OF AN ACCOUNT AGAINST "THE GLOUCESTER FERRY COMPANY."

And now, this thirteenth day of August, 1880, "The Gloucester Ferry Company" do appeal from the settlement of account against them, finding them to be indebted to the Commonwealth in the sum of $2,593.96, and do assign the following exceptions to said settlement, in support of said appeal.

1. A portion of the settlement is for a tax during a period anterior to any Act of Assembly, imposing taxes on the capital stock of foreign corporations.

2. The said, "The Gloucester Ferry Company," are incorporated by the laws of the State of New Jersey, and not by the laws of Pennsylvania, and are not liable to taxation by said State.

3. The said, "The Gloucester Ferry Company," are incorporated by the laws of the State of New Jersey, to ferry passengers across the River Delaware, between New Jersey and the State of Pennsylvania, and are not amenable to the tax laws of the latter
4 State.

4. The said, "The Gloucester Ferry Company," do not do business in the State of Pennsylvania, and have not done business in said State, at any time since the year 1864, and, being a foreign corporation, are not amenable to taxation by said State.

5. During no portion of the time covered by the said settlement, has the said, "The Gloucester Ferry Company," had any assets or property, real or personal, in the State of Pennsylvania.

6. The proposed taxation of the said, "The Gloucester Ferry Company," a Company incorporated solely by the laws of the State of New Jersey, to ferry passengers across the River Delaware, between the States of New Jersey and Pennsylvania, is unconstitutional, inasmuch as it violates the provisions of the Constitution of the United States.

JOHN G. JOHNSON,
Attorney Gloucester Ferry Co.

(Endorsement on Exceptions), 459, Aug. T., 1880. *In re* the settlement by the Auditor General and State Treasurer of an account against "The Gloucester Ferry Company." Appeal by "The Gloucester Ferry Company." Filed in Auditor-General's Department, August 19, 1880. Filed August 19, 1880, Jno. G. Johnson, 708 Walnut St., Atty. for Appellant.

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5 CASE STATED.

COMMON PLEAS OF DAUPHIN COUNTY.

In re *Appeal of* "*Gloucester Ferry Company.*"

The "Gloucester Ferry Company" was duly incorporated by act of the General Assembly of the State of New Jersey, approved 9th March, 1865, (*pro ut* charter,) with a capital stock of $50,000, divided into shares of $50 each, to erect a steamboat ferry from some point in the town of Gloucester, in the township of Union, in the county of Camden, State of New Jersey, to such place or places in the City of Philadelphia as should best secure the public

convenience and interest of said corporation, and for that purpose, with power to purchase or lease real estate, erect wharves, piers, slips, buildings and all other necessary appendages, and to build steamboats, vessels and ferry-boats, and with further power to make contracts with other corporations and with individuals for transporting or carrying any kind of goods, merchandise, freight, or passengers.

By the said charter it is provided that the President and Directors might, from time to time, make such dividends of the net
6 profits of their business as they might deem prudent. Stockholders' meetings were directed to be held in the said county of Camden, and notice of the said meetings is directed to be published in one or more newspapers printed in the county of Camden. The company has never had any charter from the State of Pennsylvania.

Since the year 1865 the said corporation has maintained a ferry between said town of Gloucester and city of Philadelphia, across the river Delaware, leasing or owning steam ferry boats for such purposes. At each of said places it has rented, until recently, a slip or dock. Within a year, it has purchased the real estate in the county of Camden needed for its purposes. It still continues to lease that used by it in the city of Philadelphia.

It has never transacted any other business saving that of ferrying passengers and freight across said river between said town and city.

It has never owned any real or personal property located in the city of Philadelphia.

Its property consists exclusively of real estate as aforesaid in the county of Camden, certain steamboats, engaged in said ferriage, and a lease of a wharf, slip or dock in the city of Philadelphia It has never consisted of any thing additional. The boats now
7 owned by it are registered at the said port of Camden, and it has never owned any boats registered in any port of the State of Pennsylvania. No boats used by it have ever been allowed to remain in any portion of the last named State, saving so long as has been necessary to receive and load passengers and freight thus ferried, or to be ferried.

The Auditor-General and State Treasurer stated an account against said company, on the 7th of July, 1880, of taxes on its capital stock, based upon the appraised value thereof, for the

years from 1865 to 1879, both inclusive, finding the amount of $2,593.96 to be due to the Commonwealth.

The present case is an appeal, duly entered from said account stated.

If the Court be of the opinion, under the within statement of facts, that the company is liable to the Commonwealth for a tax upon its capital stock, then judgment shall be entered in favor of the Commonwealth against said company for the amount of said statement, viz.: $2,593.96, with interest, costs and commission of Attorney-General from 7th July, 1880; but, if it be of the opinion that the said company is not liable to pay a tax on said capital stock, then judgment is to be entered in favor of the said company.

8 Either party is to be allowed an appeal or writ of error.

JOHN G. JOHNSON.
Attorney Gloucester Ferry Co.

LYMAN D. GILBERT,
Deputy Attorney-General.

PHILADELPHIA CITY, *ss.*

Before me, the subscriber, a Notary Public in and for the Commonwealth of Pennsylvania, personally appeared William M. Farr, who, being duly sworn, says that he is the President of "The Gloucester Ferry Company," and that the facts set forth in the foregoing case stated are true, to the best of his knowledge, information and belief.

WILLIAM M. FARR,
President.

Sworn and subscribed before me, this fourteenth day of December, 1880.

{ Seal of GEORGE HOUSE, Notary Public. }

GEORGE HOUSE,
Notary Public.

(Endorsement on case stated), 459, Aug. T., 1880, Commonwealth *vs.* Gloucester Ferry Co. Case stated filed Jan. 5, 1881.

OPINION AND DECISION OF THE COURT OF COMMON PLEAS.

The Commonwealth of Pennsylvania	No. 459.
vs.	August Term, 1880.
The Gloucester Ferry Company.	Case stated.

Per curiam. This case came into court by appeal from the decision of the Auditor General and State Treasurer, who had charged the defendant with a State tax, with the interest thereon, commencing on the ninth day of March, 1865, and ending on the determination of the year 1879, amounting to $2,593.96. The defendant denies owing anything.

A case has been stated for the opinion of the Court which presents substantially the following state of facts: On the 9th of March, 1865, the defendant was incorporated as a company to ferry freight and passengers across the Delaware river from the town of Gloucester, in the State of New Jersey, to the city of Philadelphia, in the State of Pennsylvania, with a capital of $50,000, divided into shares of $50 each. All of the stock was held, and the stockholders resided, in the State of New Jersey. The steam ferry boats were all registered there under the laws of the
10 United States; lay there at all times except when engaged in navigation; the company had its wharf there, as also its business office, and there its officers and men resided. It had no other connection with Pennsylvania except a wharf or slip, rented in the city where it landed and received its freight and passengers.

The ferry and its company was never in any manner recognized by the laws of Pennsylvania, nor by its State officers, until the year 1880, when it was for the first time taxed. Have we any law imposing a tax on this company? If so, for how much?

It is conceded by the Attorney-General, on the argument, that there was none prior to that on the first day of May, 1868, the 4th section of which, it is contended, enabled the officers to impose a tax under these words: "That the capital stock of all companies whatever, incorporated by or under any law of this Commonwealth, or incorporated by any other State and lawfully doing business in this Commonwealth, shall be subject to pay a

tax into the treasury of the Commonwealth annually, at the rate of one half mill for each one per cent. of dividend made or declared by such company; and in case of no dividend being made or declared by such company, then three mills upon a valuation of the capital stock of the same, made in accordance with the second section of this act." That valuation was to be made under
11 oath by the officers of the company, and if the State officers were dissatisfied with the valuation, then to be made by themselves. Was this New Jersey corporation lawfully doing business in this State according to the meaning and intention of that statute? Was it subject to a taxation on the whole value of its capital stock as imposed? If not on the whole, on what part? Was the defendant exempt from taxation on the ground of trade and commerce between the States?

It may be conceded that this New Jersey corporation was doing some business in this State. Its boats stopped at a wharf or slip daily in landing its freight and passengers. For the most part, passengers stopped on and off at that point. The company had no office, and owned no land. Did the Legislature intend, by such a transaction of business, that this company should be taxed on its whole capital stock, or even on the half of it? For if it can be taxed on the half, it can be on the whole. If the Northwestern Railroad, with a capital of forty millions, incorporated under the laws of Illinois or Wisconsin, should occasionally land a car load of grain in Pennsylvania, our officers could lawfully tax it at the rate of three mills on its whole capital stock, although there was not a dollar of its stock held in this State, nor any of its stockho ders residing here, or any office or warehouse opened within our borders. With quite as much plausibility could the whole stock of the Erie Railway be taxed in Pennsylvania because
11 that road passes through twenty-six miles of our territory, or the whole stock of the Lake Shore and New York Central, including the Lake Shore Road from the city of New York to Chicago, be taxed because the road ran through the triangle. Such a system of taxation was never practiced in Pennsylvania. We tax in proportion to the capital employed on ground used in our State, not in proportion to the whole capital stock. Some appraisement is always made, and regard had to the use made of the occupancy. But it is urged that one half of the river ferried over belongs to

Pennsylvania. The river is one of the great highways of nature, and no State has a right to the water. Any State, or the nation at large, has an equal right of navigation. No one can claim an exclusive right. Vessels from Maryland or Virginia have an equal right to sail on its waters with Pennsylvania or New Jersey, even to the margin of low water. We are referred, by the Attorney-General, to the case of the Trenton, Delaware, Bridge Company, reported in 9 Am. Law Register, 298, to show that this company can be taxed to the value of one half of its capital. We are unable to see the slightest analogy between the cases. That company was incorporated by both States; the bridge was authorized by both; it was a permanent and solid structure, erected equally over the soil of each; and although the most of the stock may have been held in New Jersey, that was unimportant. The structure was on the territory of each, and this State would have the same right to
13 tax that part within her borders that she would a tract of land improved by New Jersey capital. The mere right of navigation over public waters is different from building permanent structures by authority of our laws. New Jersey neither asked nor was required to ask for leave to navigate the river, nor had it any necessity to ask for leave to land its passengers. It had that right by the comity of nations and the navigation laws, and our State could not prohibit it.

In a case where the State undertakes to tax, it must show jurisdiction over the person or the property. Here it has none over either. How can it tax the stock? It has no jurisdiction over it, as it is in no wise held in this State. The Legislature might impose a tax on wharfs, slips, &c., but it probably never has, and if it might so do, or has so done this tax has not been so imposed. It would be by valuation, or by the trip, and it is held that it may charge for the use of wharfs, &c., a reasonable sum, but not by the tonnage of the vessel; 20 Wallace, 577, 582. And ships may be taxed to the owner, like other property, at his residence; 9 Otto, 283–4. These vessels are all registered at their port in New Jersey, where the owners and masters reside, and it is clearly settled that they cannot be taxed by reason of going into, landing, or trading in any other port in the United States; therefore, where a vessel was registered in New York it could not be taxed for trading in Mobile, or any of the ports of California or Oregon; Hays

14 *vs.* The Steamship Company, 17 Howard 596; 23 New York, 227. It would interfere with the commerce of the States if the vessel could be taxed at every port where it landed; 16 Wallace, 475. The property is there for a temporary purpose, and does not become incorporated with that of the State; *Idem*, 476. And touching at a port, and trading there did not render the vessel liable to be taxed there; *Idem*, 478–9. Congress has the power to regulate the commerce of the country, and the States cannot impose a tax on it otherwise or greater than that imposed by Congress, nor can the effect be changed by changing the name, or taxing the occupation of the master; per Green. J., in the passenger cases, 7 Howard, 458. The State cannot tax the landing of Passengers; *Idem.* Our State can neither tax nor prohibit this New Jersey corporation from landing its passengers in this State, for if we can tax we can prohibit, as was declared by Chief Justice Marshall in several of the early cases, and the principle is fully recognized in Crandel *vs.* The State of Nevada, 6 Wallace, 35. The State cannot change the effect by taxing the bill of landing instead of the registered vessel, or its freight; Almy *vs.* The State of California, 24 Howard, 169. All taxation must relate and be limited to persons, property, or business within the State; all must apply to one or the other. 15 Wallace, 300. In the present case our State cannot lawfully impose this tax, it is not on the person or
15 property, all of which is situated in New Jersey, nor can it on the business, for that is protected for the benefit of trade, there being none other conducted than the landing and receiving of passengers. This is part of the commerce of the country. The passengers are secured in going and coming by the Federal Constitution, nor can these principles be evaded by attempting to impose the tax on the stock of the company—it is a mere change of names and cannot change the effect. We are, therefore, clearly of opinion that the whole of this tax is illegal and assessed without authority, and even if our statute would bear the construction put on it by the State Officers, it would be in violation of the laws and Constitution of the United States. Here our opinion might end, but as there is a reviewing court, we will notice some erroneous items. There is no law authorizing the assessments of 1865, '66 and '67, and we are not aware of any authorizing six mills on the stock for 1875, 1876 and 1877. When the officers came down to 1874,

they appraised one half of the stock at 32,000. The same for 1875–6–7 and 8, and for 1879 at 50,000. Nothing has been shown, or even suggested, to authorize these changes, but as this is a case stated, we may be going beyond our power in suggesting all of this doubling over. The Court gives judgment in favor of the defendant on the stated case.

JNO. J. PEARSON,
President Judge.

16 (Endorsement on opinion and decision), No. 459 Aug. T., 1880. The Commonwealth of Pennsylvania *vs.* "The Gloucester Ferry Company." Opinion of the Court, filed Jan. 5, 1881.

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17 EXCEPTIONS TO DECISION OF COMMON PLEAS.

The Commonwealth of Pennsylvania,	In Dauphin Common Pleas.
vs.	August Term, 1880.
The Gloucester Ferry Company.	No. 149.

The Commonwealth of Pennsylvania, in accordance with the provisions of 22d of April, 1874 (P. L., 109), excepts to the following portions of the decision of the Court in the above stated case:

1. "The ferry and its company was never in any manner recognized by the laws of Pennsylvania, nor by its State officers, until the year 1880, when it was for the first time taxed."

2. "The company had no office, and owned no land, (in this State.)"

3. "How can it (the State) tax the stock. It has no jurisdiction over it, as it is in no wise held in this State."

4. "Our State can neither tax nor prohibit this New Jersey corporation from landing its passengers in this State, for if we can
18 tax we can prohibit, as was declared by Ch. J. Marshall, in several of the early cases, and the principle is fully recognized in Crandel *vs.* The State of Nevada, 6 Wallace, 35."

5. "In the present case our State cannot lawfully impose this tax, it is not on the person or property, all of which is situated in New Jersey, nor can it on the business, for that is protected for the benefit of trade, there being none other conducted than the landing and receiving of passengers. This is part of the commerce of the country. The passengers are secured in going and coming by the Federal Constitution; nor can these principles be evaded by attempting to impose the tax on the stock of the company; it is a mere change of names and can not change the effect. We are therefore clearly of opinion that the whole of this tax is illegal and assessed without authority, and even if our statute would bear the construction put on it by the State officers, it would be in violation of the laws and Constitution of the United States."

6. "The Court gives judgment in favor of the defendant on the stated case."

LYMAN D. GILBERT,
Deputy Attorney General.

19 2d May, 1881. Objection overruled, and judgment entered in favor of the defendant and against the Commonwealth of Pennsylvania, and exception sealed.

JNO. J. PEARSON. [SEAL.]

(Endorsement on exceptions), No. 459, Aug. T., 1880. Commonwealth of Pennsylvania *vs.* Gloucester Ferry Co. Exceptions to decision of Court filed Feb. 5, 1881.

20 Among the records of the Supreme Court of Pennsylvania, in and for the Middle District, to No. 162 of May Term, 1881, it is contained as follows, to wit:—

DOCKET ENTRIES.

WRIT OF ERROR TO THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENN'A, NO. 459, AUG. T., 1880.

Gilbert. *Commonwealth of Pennsylvania, Plaintiff below,*

162. VS.

Johnson. *Gloucester Ferry Company, Defendant below.*

1881, May 2. Præcipe for writ of error and affidavit filed.

Same day. Writ of error to the Court of Common Pleas of Dauphin County issued, returnable on third Monday of May, '81.

1881, May 16. Writ of error returned with record from the Court of Common Pleas of Dauphin County, and filed.

Same day. Specifications of error filed.

1881, May 20. Called for argument and argued.

1881, Oct. 17. And now, to wit, this cause came on to be heard; and, on due consideration thereof, it is ordered that the judgment of the court below be now reversed, and it is ordered that judgment on the case stated be entered for the Commonwealth and against the defendant in the sum of $2,593.96, with interest from July 7, 1880, Attorney-General's commission and costs.

21 *Per Curiam.* Gordon, J.

Green, J., dissents in opinion filed.

1881, October 30. At Pittsburgh, *sur* motion for re-argument. Re-argument refused. *Per Curiam.*

1881, Dec. 6. Writ of error from the Supreme Court of the United States; citation to defendant in error; writ of error bond in the penal sum of six thousand dollars, approved by Hon. George Sharswood, Chief Justice of the Supreme Court of Pennsylvania, and justification of bail received and filed.

Service of citation accepted by Henry W. Palmer, Attorney-General, Nov. 3, 1881.

Certified from the record.

HARRISBURG, PA., Dec. 14, 1881.

[Seal of the Supreme Court of Pennsylvania, Middle District.]

ROBT. SNODGRASS,
Proth'y Sup. Ct. Pa., Mid. Dist.

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22 PRÆCIPE FOR WRIT OF ERROR.

Commonwealth of Pennsylvania, Plaintiff below, Plaintiff in Error,

vs.

Gloucester Ferry Company, Defendant below, Defendant in Error.

In the Supreme Court of Pennsylvania, for the Middle District.

Issue Writ of Error to the Court of Common Pleas of Dauphin County to remove the record and proceedings in a case stated, depending therein to No. 459 of August Term, 1880.

Returnable to May Term, 1881.

LYMAN D. GILBERT,
Deputy Attorney General, Attorney for Plaintiff in Error.

To ROBT. SNODGRASS,
Prothonotary Supreme Court of Pennsylvania, Middle District.

DAUPHIN COUNTY, *ss.*

Lyman D. Gilbert, the above named Attorney for Plaintiff in Error, being duly sworn, according to law, deposes and says, that the writ of error in this case is not intended for delay.

LYMAN D. GILBERT,
Deputy Attorney General.

Sworn and subscribed before me, this second day of May, 1881.

ROBT. SNODGRASS,
Prothy. Sup. Ct., M. D.

(Endorsement on Præcipe), No. 162, May Term, 1881, Supreme Court of Pennsylvania, Middle District. Commonwealth of Pennsylvania *vs.* Gloucester Ferry Company, Dauphin County.

Præcipe and affidavit for writ of error filed 2d May, 1881. Gilbert, for plaintiff in error.

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23 WRIT OF ERROR FROM SUPREME COURT OF PENNSYLVANIA.

MIDDLE DISTRICT OF PENNSYLVANIA, *sct.*

Seal of the Supreme Court of Pennsylvania, Middle District.

The Commonwealth of Pennsylvania, to the Justices of the Court of Common Pleas, for the County of Dauphin, Greeting:

Because in the record and process, and in rendering the judgment in a certain plaint, which was in our own said court, before the judges of the same court, by our writ, between The Commonwealth of Pennsylvania, Plaintiff in Error, and The Gloucester Ferry Company, Defendant in Error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the same plaintiff in error, we have received information: We, willing that if any error be therein, it should be corrected, and that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process, and all things touching the same, under your seals, distinctly and openly, you have before the justices of our Supreme Court of Pennsylvania, at a Supreme Court to be held at Harrisburg, in and for the Middle District of said Commonwealth, on the third Monday of May, instant, being the
24 third Monday of the term, and this writ; that the record and process aforesaid being inspected, we may further cause to be done, what of right, and according to our laws and customs, ought.

Witness the Honorable George Sharswood, Doctor of Laws, Chief Justice of our Supreme Court, at Harrisburg, the second day of May, in the year of our Lord, one thousand, eight hundred and eighty-one, and of the Commonwealth, the one hundred and fifth.

ROBT. SNODGRASS,
Prothonotary.

The record and process, and all things touching the same, so full and entire as before us they remain, to the Honorable the Judges of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Middle District, we certify and send as within we are commended.

JNO. J. PEARSON, [L. S.]
President Judge.

(Endorsement on writ of error), No. 162, May Term, 1881, Supreme Court, Middle District; Commonwealth of Pennsylvania, Plaintiff in Error, *vs.* Gloucester Ferry Company, Defendant in Error. Writ of error to the Court of Common Pleas for the County of Dauphin (No. 459, August Term, 1880). Returnable the third Monday of May, 1881. Rule on the defendant in error to appear and plead on the return day of the writ.

N. B.—Twelve days' notice to the parties or counsel below is necessary to compel an appearance.

Filed May 9th, 1881. Filed in Supreme Court May 16th, 1881. Gilbert.

25 *SPECIFICATIONS OF ERROR.**

The Court erred in deciding as follows:—

1. "The ferry and its company was never in any manner recognized by the laws of Pennsylvania, nor by its State officers, until the year 1880, when it was for the first time taxed."

The Court erred in deciding as follows:—

2. "The company had no office, and owned no land" (in this State).

The Court erred in deciding as follows:—

3. "How can it (the State) tax the stock? It has no jurisdiction over it, as it is in no wise held in this State."

The Court erred in deciding as follows:—

4. "Our State can neither tax nor prohibit this New Jersey corporation from landing its passengers in this State; for if we can tax we can prohibit, as was declared by Ch. J. Marshall in several of the early cases, and the principle is fully recognized in Crandel *vs.* The State of Nevada, 6 Wallace, 35."

*Of plaintiff in error, in the Supreme Court of Pennsylvania.

The Court erred in deciding as follows:—

5. "In the present case our State can not lawfully impose this tax; it is not on the person or property, all of which is situated in New Jersey; nor can it on its business, for that is protected for the benefit of trade, there being none other conducted than the landing and receiving of passengers. This is part of the commerce of the country. The passengers are secured in going and coming by the Federal Constitution; nor can these principles be evaded by attempting to impose the tax on the stock of the company; it is a mere change of name, and can not change the effect. We are, therefore, clearly of opinion that the whole of this tax is illegal, and assessed without authority; and even if our statute would bear the construction put on it by the State officers, it would be in violation of the laws and Constitution of the United States."

The Court erred in deciding as follows:—

6. "The Court gives judgment in favor of the defendant on the stated case."

LYMAN D. GILBERT,
Deputy Attorney-General.

For HENRY W. PALMER,
Attorney-General.

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26 OPINION OF SUPREME COURT OF PENNA.

THE COMMONWEALTH OF PENNSYLVANIA *vs.* THE GLOUCESTER FERRY COMPANY.

Error to the Common Pleas of Dauphin County.

GORDON, J.—In this case a single question is presented for our consideration. Did the defendant do business within the State of Pennsylvania during the period for which the tax in controversy was imposed? If it did, then it came within the provisions of the Acts of May 1, 1868, and June 7, 1879, and was subject to the tax therein prescribed.

In the discussion of this case, it must not be forgotten that a corporation has no natural rights; that it is but a legal entity, an

artificial person, and that its rights spring either from legislative enactment or from comity. Within the State of its creation it had no power but those conferred upon it by the legislative act which called it into being, and whether it shall or shall not perform any of its functions in a foreign State depends wholly upon the will of such State, expressed either by statute or implied under that general law known as international comity: Bank of Augusta *vs.* Earl, 13 Peters, 519.

27 From this view of the case it becomes obvious that the Legislature may not only tax foreign corporations doing business in this State, but, if it so chooses, as was done by our Act of March, 1810, in regard to foreign insurance companies, altogether prohibit the transaction of such business. It follows, that there has been a good deal of learning wasted in this case in the endeavor to assimilate the rights of this corporation to those of individual citizens, when, in fact, they are totally dissimilar, and based upon principles totally different.

Returning then, to the only question in this case, the inquiry is, did this Ferry Company do business in the State of Pennsylvania? But this question may be readily solved by the answer which must necessarily be given to another question; that is, where were its principal, or, for that matter, only points of operation? The answer is, at Gloucester and Philadelphia. Its whole income was derived from the transportation of freight and passengers from its wharf at Gloucester to its wharf at Philadelphia, and from its wharf in Philadelphia to its wharf in Gloucester. At each of these points it had a place, that is, a wharf, where its main business, namely, its receipt of freight and passengers, was transacted, and for that business, it was just as much dependent upon the one place as upon the other. Again, a wharf or landing place was neces-

28 sary at each end of its route; the one it occupied at Gloucester was owned in fee, and the one in Philadelphia it held under a lease; but as it could hold by purchase in New Jersey only by virtue of the power derived from the statutory will of the Legislature of that State, so it could hold by lease in Philadelphia only by the implied consent of the Legislature of this Commonwealth. It thus appears that the defendant was dependent equally, not only for its business, but its power to do that business, upon both States, and might, therefore, be taxed by both. We may here

state that, with the Court below, we cannot understand by what authority the assessments for the years 1865, 1866 and 1867 were made; nevertheless, as the case stated provides for no modification in this respect, of the action of the taxing officers, or of the judgment which may be entered against the defendant, we do not feel ourselves justified in making such an attempt, and this the more so since we have been furnished with no data by which a modification or correction can be made.

The judgment of the Court below is now reversed, and it is ordered that judgment on the case stated be entered for the Commonwealth and against the defendant, in the sum of $2,593.96, with interest from July 7th, 1880, Attorney-General's commissions and costs.

(Endorsement on opinion), No. 162, May Term, 1881, Commonwealth of Pennsylvania *vs.* The Gloucester Ferry Company. Error to Common Pleas of Dauphin County. Argued May 20th, 1881, Gordon, J. Filed Oct. 17, 1881.

29 JUDGMENT OF THE SUPREME COURT OF PENN'A.

Judgment entered October 17th, 1881, as follows, to wit:—

And now, to wit, October 17th, 1881, this cause came on to be heard, and, on due consideration, it is ordered that the judgment of the Court below be now reversed; and it is ordered that judgment on the case stated be entered for the Commonwealth and against the defendant, in the sum of $2,593.96, with interest from July 7th, 1880, Attorney-General's commission and costs.

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30 PETITION AND MOTION FOR REHEARING.

Commonwealth of Pennsylvania
vs.
The Gloucester Ferry Company.

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA:

The appellee respectfully prays for a rehearing in the above cause, and for reason assigns the following:—

The appellee neglected to bring to the attention of the Court that which is deemed essential to the true determination of the controversy.

In the year 1771 a contract was entered into between the States of Pennsylvania and New Jersey, in which it was provided that the river Delaware should be a "common highway for purposes of navigation;" that the two States were "to exercise concurrent jurisdiction within and upon the water;" that the whole length and breadth of the river was to "be and remain a common high-
31 way, equally free and open for the use, benefit and advantage of the said contracting parties."

In pursuance of the contract, each State passed a law for the purpose of declaring the said river, *inter alia*, a "common highway," and for improving the navigation of the same. The Pennsylvania act is dated 9th March, 1771, and is to be found in 1 Smith's Laws, 322. The New Jersey act is dated 22d December, 1771, and is to be found in Allinson's Laws, 347.

By the Pennsylvania act it is, *inter alia*, provided:—

"Whereas, the improving the navigation in rivers is of great importance to trade and commerce, ... Be it therefore enacted that the river Delaware . . . . is hereby declared to be a common highway for the purposes of navigation up and down the same."

JOHN G. JOHNSON,
For Appellees.

(Endorsement on petition and motion), 162, May Term, 1881. Supreme Court of Pennsylvania, Middle District. Commonwealth *vs.* Gloucester Ferry Company. Petition for rehearing. John G. Johnson, for appellee.

Petition refused. *Per Curiam*, October 30th, and filed October 31st, 1881.

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32 And now, here, on this day, to wit, December 6th, 1881, the said The Gloucester Ferry Company produced to the Supreme Court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the premises,

commanding the records and proceedings aforesaid of the judgment aforesaid, so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington, on the second Monday of October next, which writ of error is in the words and of the tenor following, to wit:—

33 UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the Honorable the Judges of the Supreme Court of the Commonwealth of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania, before you, or some of you, being the highest court of law or equity of the said Commonwealth in which a decision could be had in the said suit between the Commonwealth of Pennsylvania, plaintiff, and the Gloucester Ferry Company, defendant, wherein was drawn in question the invalidity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said Commonwealth, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the
34 United States, and the decision was against the title, right, privilege or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said The Gloucester Ferry Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there

held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

{ Seal of United States Circuit Court, Eastern District of Pennsylvania. } *Witness* the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Philadelphia, this fifteenth day of November, A. D. 1881.

SAMUEL BELL,
Clerk Circuit Court U. S., Eastern Dist. Penn'a.

(Endorsed.) Filed December 6, 1881, in the office of the Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District, at Harrisburg.

ROBT. SNODGRASS,
Prothonotary.

35 In pursuance whereof, and according to the form and effect of the Act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States, accordingly.

36 COPY OF WRIT OF ERROR BOND.

SUPREME COURT OF THE STATE OF PENNSYLVANIA, MIDDLE DISTRICT.

Know all Men by these Presents, That we, The Gloucester Ferry Company, Jno. C. Farr, residing No. 1810 Spruce Street, Philadelphia, and George W. Farr, Jr., residing No. 1810 Spruce Street, Philadelphia, are held and firmly bound unto the Commonwealth of Pennsylvania, in the full and just sum of Six Thousand Dollars, to be paid to the said Commonwealth of Pennsylvania, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated the seventh day of November, A. D. one thousand eight hundred and eighty-one.

WHEREAS, lately in the Supreme Court of Pennsylvania, a judgment was entered in a suit therein, pending between the said Commonwealth of Pennsylvania and the said The Gloucester Ferry Company, in the sum of $2,593.96, with interest from July 7, 1880, and Attorney General's Commissions and costs; and the said The Gloucester Ferry Company, having obtained a writ of error to the Supreme Court of the United States of America, and
37 a citation by the Chief Justice of the Supreme Court of Pennsylvania, directed to the Commonwealth of Pennsylvania, citing and admonishing the said Commonwealth to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of October, 1882.

Now the condition of the above obligation is such, that if the said The Gloucester Ferry Company shall prosecute its writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

{Seal of The Gloucester Ferry Co.}

WILLIAM M. FARR,
President of The Gloucester Ferry Co.

Attest:

A. HECKMAN,
Secretary.

JNO. C. FARR,
GEORGE W. FARR, JR.

Sealed and delivered in the presence of

JOHN C. PEDRICK,
F. W. HECKMAN,
CATHARINE C. FARR,
W. P. BROWN.

Approved,

GEO. SHARSWOOD,
Chief Justice.

(Endorsement on writ of error bond), No. 162, May T., 1881. Supreme Court, Middle District; bond of The Gloucester Ferry Company, *sur* appeal to the Supreme Court of the United States, filed Dec. 6, 1881, in the office of the Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District, at Harrisburg.

ROBT. SNODGRASS,
Prothonotary.

38 COPY OF JUSTIFICATION OF BAIL.

In re *Appeal of the Gloucester Ferry Company.*

Sur APPROVAL OF BAIL FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Jno. C. Farr, Esq., duly affirmed, says: I reside at 1810 Spruce Street, Philadelphia; I am retired from business; I own the house I reside in; it is clear of all encumbrances; I have owned the property for twenty-five years; I consider the property worth $25,000; I believe it is assessed at $20,000 for taxation; I own other real estate in the city of Philadelphia; I am worth at least $25,000 after payment of all my debts and liabilities; I am not security in any other case.

JNO. C. FARR,

Affirmed and subscribed before me, this 7th day of November, A. D. 1881.

HAROLD P. NEWLIN,
Deputy Prothonotary.

[Seal of the Supreme Court of Pennsylvania, Eastern District.]

39 George W. Farr, Jr., duly affirmed, says: I reside at 1810 Spruce Street, Philadelphia; I am retired from business; I am worth, in personal property, at least $25,000; I am not security for anybody, or in any other case; I have no debts or liabilities other than of a trifling personal character.

GEO. W. FARR, JR.

Affirmed and subscribed before me, this 7th day of November, A. D. 1881.

HAROLD P. NEWLIN,
Deputy Prothonotary.

[Seal of the Supreme Court of Pennsylvania, Eastern District]

(Endorsement on justification), No. 162, May Term, '81. Rewrit of error by The Gloucester Ferry Company to the Supreme Court of the United States. Justification of bail before the Prothonotary of the Eastern District. Filed December 6th, 1881, in the office of the Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District, at Harrisburg.

ROBT. SNODGRASS,
Prothonotary.

3. The learned Court erred in holding that the Defendant was subject to the taxing power of the State of Pennsylvania.

4. The learned Court erred in holding that the business of navigating the Delaware river, transacted by defendant, could be interfered with or controlled by the State of Pennsylvania.

5. The learned Court erred in not holding that the Act of Assembly of the State of Pennsylvania, so far as it taxes foreign corporations, employed in the business of navigation, was violative of the Constitution of the United States.

44 *To the Honorable the Judges of the Supreme Court of the United States of America:*

The petitioner prays for a reversal of the judgment entered against it, in the Supreme Court of Pennsylvania, for the reasons assigned above.

THE GLOUCESTER FERRY CO.

By JOHN G. JOHNSON.
Attorney.

(Endorsement), Supreme Court, Middle District. Assignments of error and prayer for reversal.

114-96
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Office Supreme Court U. S.
FILED.
JAN 23 1885
JAMES H. McKENNEY,
CLERK.

No. 185. *October Term, 1884.*

Supreme Court of the United States.

The Gloucester Ferry Company,
Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania.

In Error to the Supreme Court of Pennsylvania.

JOHN G. JOHNSON,
For Plaintiff in Error.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.

I. History of the Case.

The Gloucester Ferry Company was incorporated by the laws of New Jersey with a capital stock of fifty thousand dollars ($50,000), to erect a steamboat ferry from some point in the town of Gloucester in the State of New Jersey, to such place or places in the city of Philadelphia as would best serve the public convenience and interest of such corporation. It has maintained a ferry across the river Delaware between said town and city since the year 1865, leasing or owning steam ferry-boats for such purpose. Its property consists exclusively of real estate in New Jersey, in which State its office is located, and of steamboats licensed and registered in said State. It never owned any real or personal property located in the State of Pennsylvenia, and never transacted any business, saving that of ferrying passengers and freight across said river. Its boats were never allowed to remain in Pennsylvania, saving for the length of time it was necessary to receive and load passengers and freight ferried or to be ferried. It was the lessee of a slip or dock at Philadelphia into which its boats ran whilst landing or receiving passengers.

In the year 1771 a contract was entered into between the States of Pennsylvania and New Jersey, in which it was provided that the river Delaware should be a "common highway "for purposes of navigation;" that the two States were "to "exercise concurrent jurisdiction within and upon the water;" that the whole length and breadth of the river was to "be and "remain a common highway, equally free and open for the use, "benefit and advantage of the said contracting parties." In pursuance of this contract each State passed a law for the purpose of declaring such river, *inter alia*, a "common highway," and for improving the navigation of the same. The Pennsylvania act is dated 9th March, 1771, and is to be found in 1 Smith's Laws, 322. The New Jersey act is dated 22d of December, 1771, and is to be found in Allinson's Laws, 347. By the Pennsylvania act it is, *inter alia*, provided: "Whereas, the

"improving of navigation in rivers is of great importance to "trade and commerce, * * Be it therefore enacted that "the river Delaware * * is hereby declared to be a 'com- "'mon highway," for the purpose of navigation up and down "the same."

By various acts of Assembly of the Commonwealth of "Pennsylvania it was provided:—"The capital stock of all "corporations, whether incorporated by or under any law of "this Commonwealth, or incorporated by any other State, and "lawfully doing business in this Commonwealth, or that may "hereafter be incorporated, * * * * shall be subject to "pay * * * a tax," &c., &c.

Under this act of Assembly, the taxing officers of the State of Pennsylvania assessed the capital stock of the plaintiff in error with a tax upon one-half of its amount, which they valued, however, in some cases at $32,000, and in others at $50,000.

From this assessment an appeal was taken to the Court of Common Pleas of Dauphin county, Pennsylvania, which was sustained.

The decision of the said Court of Common Pleas was reversed by the Supreme Court of Pennsylvania upon an appeal taken by the Attorney-General of the Commonwealth, and judgment was entered against the said ferry company for the original amount assessed against it by the taxing officers.

All the facts necessary for the determination of the question involved in the present cause appear in the case stated, which was agreed upon, and filed, in the Court of Common Pleas of Dauphin county.

II. Assignments of Error.

First.—The learned court erred in entering judgment against the defendant.

Second.—The learned court erred in reversing the judgment in favor of the defendant entered in the Court of Common Pleas of Dauphin county.

Third.—The learned court erred in holding defendant was subject to the taxing power of the State of Pennsylvania.

Fourth.—The learned court erred in holding that the business of navigating the Delaware river, transacted by the defendant, could be interfered with or controlled by the State of Pennsylvania.

Fifth.—The learned court erred in not holding that the act of Assembly of the State of Pennsylvania, so far as taxing foreign corporations employed in the business of navigation, was a violation of the Constitution of the United States.

III. Argument for Plaintiff in Error.

The dissenting opinion which was filed by Mr. Justice Green in the Supreme Court of Pennsylvania discusses the question involved in this controversy so elaborately and exhaustively, that it is printed as a part of the argument submitted to this court. It is hardly necessary, in what will be said in addition, to cite at length from the numerous cases in which this tribunal has considered, and settled, the right of taxation.

It was decided in the Foreign-held Bonds Case, in 15 Wallace, that no tax was legal, unless the person, property or business, taxed, was within the control of the taxing power The sum which has been assessed against the plaintiff in error cannot be maintained, though nominally upon its capital stock, as a tax upon its person or its capital. It neither derived its existence from the State of Pennsylvania, or resided, or was located therein. The *situs* of its capital stock was legally and actually in the State of New Jersey, where it was domiciled. All the investments of its capital stock in real estate and in steamboats were located in the State of New Jersey. It is true that its steamboats, in the course of its transportation business, touched at its leased dock in the port of Philadelphia, but this did not put them within the jurisdiction of the State of Pennsylvania. It was held in St. Louis *vs.* The Ferry Company, 11 Wallace, 423, that ferry-boats owned by an Illinois corporation plying between Illinois and Mis-

souri were not property "within the city" of St. Louis, or taxable as such, within the meaning of a statute taxing all property within said city.

Though in the judgment appealed from a tax was levied upon a moiety, (valued in some years at the equivalent of the whole,) of the capital stock of the corporation plaintiff in error, notwithstanding the fact that no portion of its property had ever been within the jurisdiction of the State, in a later case, of Commonwealth *vs.* The Standard Oil Company, 12 Weekly Notes of Cases, 293, it was held by the same court that a foreign corporation doing business in Pennsylvania was not liable for a tax upon its whole capital stock, but only upon such portion of the same as was *actually brought within the State and used there in business.*

It was not pretended, in the Supreme Court of Pennsylvania, that the capital stock of the ferry company, as such, was liable to a tax; but it was held that the business which it carried on was liable to an assessment by the State of Pennsylvania, and that the amount of such assessment could be determined by reference to the value of said capital stock. In delivering the opinion of the court, Mr. Justice Gordon held:

"The legislature may not only tax foreign corporations "doing business in this State, but if it so chooses, as was "done by our act of March, 1810, in regard to foreign insur- "ance companies, altogether prohibit the transaction of such "business. The inquiry is, Did this ferry company do business "in the State of Pennsylvania? But this question may be "readily solved by the answer which must necessarily be given "to another question; that is, where were its principal, or for "that matter, only, points of operation? The answer is, "at Gloucester and Philadelphia. Its whole income was de- "rived from the transportation of freight from its wharf at "Gloucester to its wharf at Philadelphia and from its wharf in "Philadelphia to its wharf in Gloucester. At each of these "points it had a place, that is, a wharf, where its main business, "viz., its receipt of freight and passengers was transacted, and "for that business it was just as much dependent upon the one "place as upon the other."

The sole question to be decided is a very narrow one, viz., was it within the power of the State of Pennsylvania to tax the capital stock of a foreign ferry company because it there landed, and received, passengers and freight, in the conduct of its business of navigation over the river Delaware between the States of Pennsylvania and New Jersey.

In discussing this question we will elaborate four propositions :—

I. The business in which the plaintiff in error was engaged, though that of a ferry company, was inter-state transportation of freight and passengers, and was therefore within the protection of the Constitution of the United States. The tax objected to was not imposed by way of a ferry license, and no question of the right of the State of Pennsyvania to establish, or maintain, ferries, is involved.

II. A foreign corporation has the same right as an individual to conduct, everywhere, the business of interstate transportation.

III. The tax objected to was unconstitutional, because it interfered with commerce and obstructed and hampered the right of interstate transportation granted by the Constitution.

IV. Said tax was illegal, because it exacted payment by the State of Pennsylvania for a privilege which it could neither grant nor deny.

As to the first proposition.

It is not necessary, in view of the self-evident character of the proposition, and of what has been so often said by this court, to do more than assert that the transportaion over navigable rivers separating two States, of freight and passengers, is commerce. Our only aim under this head will be to show that the fact of its being a ferry company does not in any way restrict the right of the plaintiff in error.

In Conway *vs.* Taylor's Executors, 1 Black, 603, it was

held that a ferry franchise was a right of property, and that it would be protected. In that case an injunction by the owner of said franchise, who was a riparian owner, against those who sought to interfere with it was sustained. This court said that commerce must be conducted, subject to private rights. It held further that the regulation of ferry franchises was within the police powers of the States, of which they were not deprived by the Constitution. Mr. Justice Swayne said:—

"The counsel for the appellants insist that as respects transportation from the Kentucky side and from the Commodore's wharf at the foot of Monmouth street, that vessel is enjoined under all or any circumstances from transporting persons or property to the opposite shore, unless under the authority of the State of Kentucky. We do not so understand the decree. If we did, we should, without hesitation, reverse it. An examination of the context leaves no doubt in our minds that the court intended only to enjoin the Commodore, under 'all or any circumstances, from transporting persons or 'property' from the Kentucky shore in *violation of the ferry rights of the appellees.*" He further said: "Undoubtedly the States, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them."

In Wriggins Ferry Company *vs.* East St. Louis, 107 U. S., 365, it was held that a State has power to impose a license fee on ferry keepers living in the State for boats owned and used in transporting goods and passengers to another State.

The right to confer ferry franchises *may* be so exercised as to interfere with and regulate commerce; and, whenever this result is arrived at, the right itself must give way. In none of the ferry cases which have come before this court, has there been any such improper exercise of the right.

The establishment of ferries is a matter of local importance which may be necessary for the welfare of the State. If the right to establish them is open to all, there may be no inducement to establish what will not be protected against competition if it prove successful. Men will take the risk of loss, only in case they are given the chance of profit. It is competent

for the legislature, therefore, to provide that there shall be a limited number of ferries, just as it is competent for it to say that there shall be a limited number of wharves, of railroads, of elevators and of warehouses. The effect of the limitation may be to increase the cost of commerce, but this will not be the necessary result, and such result, even if it follows, will be an accident. If the object of licensing ferries is to interfere with or obstruct commerce, the law providing for such license will be declared invalid, as was done in the case of

Gay *vs.* Baltimore, 100 U. S., 434,

where what would have been a proper charge for wharfage if general, was held illegal because it discriminated against interstate commerce. The protection of a ferry franchise may be necessary to the establishment of any ferry, and without such protection it is quite probable that there may be no ferries and no facility for transportation across rivers. The limitation of the number of ferries may diminish the cost of transportation to the passenger or freighter. Congress may determine that the subject of restricting them is one of sufficient importance to demand its legislation; but until they do so, the States may exercise their reserved powers concerning them. Incidental to the power to establish a ferry is that to exact a license fee from those who are invested with the privilege. The case of Conway *vs.* Taylor recognized the right of the owners of the ferry franchise as one of property, and sustained it by injunction. In Wriggins *vs.* St. Louis, 107 U. S., the boats taxed were within the jurisdiction of the taxing power, and were the property of its citizens. The license fees were the equivalent of the franchise which was conferred npon the owner.

The State of Pennsylvania has never attempted to exercise its police power of establishing and regulating ferries. It is open to everybody to establish as many ferries as is thought desirable, subject, of course, to the ability to secure proper places of landing on each side of the rivers crossed. No license fee has ever been exacted by the State of Pennsylvania from ferry keepers. Ferry-boats, therefore, plying on the river Delaware, have the same rights which belong to other vessels engaged

in the business of navigation, without being restricted by the rights of those possessing ferry franchises, and without being compelled to take out a license from officials qualified by the State to grant them. The regularity of its trips may determine whether or not a boat is engaged in the business of ferriage; but such regularity does not make the business anything other than that of navigation, and if this navigation is over a navigable river between two different States, it is commerce within the meaning of the Constitution, and is entitled to all the protection accorded to other kinds of navigation.

The question of the constitutionality of the tax appealed from is not complicated by any question of the right to establish ferries, or to exercise the police power of the State in licensing them. The point to be determined is not whether a license fee as the equivalent of a franchise is legal; but whether all persons and foreign corporations engaged in the business of interstate transporting may be compelled to pay a tax to the State of Pennsylvania because they receive and land, their passengers and freight, in the port of Philadelphia.

The tax objected to was levied upon the plaintiff in error simply because it conducted a business which was essentially that of commerce.

As to the second proposition.

Whilst an individual may carry on business in another State subject to no greater restrictions than are imposed upon its own citizens, a corporation has no such right, because it is not a person, within the meaning of the Constitution. Where, however, the business itself is one which is authorized to be conducted in furtherance of the Constitution, it may be conducted by any instrumentality, individual or corporate. The business being protected by the Constitution, all the means of conducting it are likewise protected.

In Paul *vs.* Virginia, 8 Wallace, 168, it was held that a statute requiring a foreign corporation to obtain a license was constitutional, though none was required from a domestic corporation; but Mr. Justice Field said:—

"It is undoubtedly true, as stated by counsel, that the power

"conferred upon Congress to regulate commerce includes as "well commerce carried on by corporations as commerce car- "ried on by individuals. At the time of the formation of the "Constitution a large part of the commerce of the world was "carried on by corporations. The East India Company, the "Hudson Bay Company, the Hamburg Company, the Levant "Company and the Virginia Company may be named among "the many corporations then in existence, which acquired, "from the extent of their operations, celebrity throughout "the commercial world. This state of facts forbids the sup- "position that it was intended in the grant of power to Con- "gress to exclude from its control the commerce of corpora- "tions. The language of the grant makes no reference to the "instrumentality by which commerce may be carried on. It "is general and includes a like commerce by individuals, part- "ners, associations and corporations. There is, therefore, "nothing in the fact that the insurance companies of New "York are corporations to impair the force of the argument "of counsel. The defect in the argument lies in the character "of their business. Issuing a policy of insurance is not a "transaction of 'commerce.' * * * * Such con- "tracts are not interstate transactions. * * * They "do not constitute a part of the commerce between the "States."

In Pensacola Telegraph Company *vs.* Western Union Telegraph Company, 96 U. S., 12, where it was held that an act of Congress establishing and maintaining lines of electric telegraph was a legitimate regulation of commercial intercourse among the States, and that a telegraph company of one State that accepted the terms of such act of Congress could not be excluded by another State from prosecuting its business within her jurisdiction, it was said by Mr. Chief Justice Waite:—

"We are aware that in Paul *vs.* Virginia, 8 Wallace, 168, "this court decided that a State might exclude a corporation "of another State from its jurisdiction, and that corporations "are not within the clause of the Constitution which declares "that 'the citizens of each State shall be entitled to all privi- "'leges and immunities of citizens in the several States.'"

That was not, however, the case of a corporation engaged in interstate commerce, and enough was said by the court to show that if it had been, very different questions would have been presented.

As to the third proposition.

We have already shown that the tax in question cannot be maintained as a tax upon the capital stock of the plaintiff in error, and that it can only rest upon the theory of a tax because of the business of the corporation. Such tax necessarily obstructed and hampered interstate transportation by making it more expensive. If the power to tax exists, there is no limit to it, and if it was competent for the State of Pennsylvania to regulate the transportation at all, it was equally competent for it to forbid it Taxation may be destruction.

It is the right of every citizen of the United States to have his person and his property transported between different States of the Union without interference by the authorities of any State. This right can only be effectual if the States are precluded from hampering and obstructing the instrumentalities which it is necessary for him to employ in this transportation. He may be compelled to pay tolls for the use of the highways (turnpikes and railroads) of the States through which he passes; but he cannot be forbidden from using these highways if he pays what is exacted from the citizens of the States in which they are located. The corporations and individuals which own these highways are subject to taxation by the authorities of the State in which they are located. This tax may render transportation more costly, and to this extent commerce may be impeded. Such impediment, however, amounts to nothing more than payment for services rendered, or to the exercise by the State of a necessary power, and is therefore legal. No tolls, however, can be exacted by any State for transportation over the navigable rivers, which are free to all. This transportation involves the necessity of landing, and of taking on, passengers and freight.

It is not competent, however, for the State to tax, directly,

either the transportation, or the goods of persons in transit. The point to be ascertained in determining whether or not a tax is legal, is, what is the subject-matter upon which it is levied.

In the very thoroughly considered case of State Freight Tax, 15 Wallace, 232, it was said by Mr. Justice Strong:—

"The rule has been asserted with great clearness that "wherever the subjects over which a power to regulate com- "merce is asserted are in their nature national or admit of "one uniform system of regulation they may justly be said to "be of such a nature as to require exclusive legislation by "Congress. Surely transportation of passengers or merchan- "dise through a State, or from one State to another, is of this "nature. It is of national importance that over that subject "there should be but one regulating power, for if one State "can directly tax persons or property passing through it, or "tax them indirectly by levying a tax upon their transporta- "tion, every other may, and thus commercial intercourse be- "tween States remote from each other may be destroyed " * * * We regard it as established that no State can im- "pose a tax upon freight transported from State to State, or "*upon the transporter because of such transportation.*"

In State tax on Railway Gross Receipts, 15 Wallace, 284, the same learned judge said:—

"But on the other hand the rightful powers of the national "government must be defended against invasion from any "quarter, and if it be, as we have seen, that a tax on goods and "commodities transported into a State or out of it, *or a tax* "*upon the owner of such goods for the right thus to transport* "*them* is a regulation of interstate commerce such as is ex- "clusively within the province of Congress, it is, as we have "shown in the former case, inhibited by the Constitution."

In the Passenger Cases, 17 Howard, 283, Mr. Justice Wayne, page 414, in summing up his conclusions, says:—

"That the power in Congress to regulate commerce with "foreign nations and among the several States includes navi- "gation upon the high seas and in the bays, harbors, lakes, "and navigable waters within the United States, and that any

"tax by a State in any way affecting the right of navigation, or "subjecting the exercise of the right to a condition, is con- "trary to the aforesaid grant."

In the same case Mr. Justice Grier, on page 464, announces as one of the conclusions of the court: "That Congress has "regulated commerce and intercourse with foreign nations "and between the several States by willing that it shall be free, "and it is therefore not left to the discretion of each State in "the Union either to refuse a right of passage to persons, or "property through her territory, or to exact a duty for permis- "sion to exercise it."

In Crandall *vs.* The State of Nevada, 6 Wallace, 34, in which a tax on a stage-coach company for every passenger carried out of the State was held unconstitutional, the court adopts and approves the language of Taney in the Passenger Cases, as follows: "We are all citizens of the United States, and as "members of the same community must have the right to pass "and repass through every part of it without interruption as "freely as in our own States. And a tax imposed by a State "for entering its territories or harbors is inconsistent with the "rights which belong to citizens of other States as members "of the Union and with the objects which the Union was in- "tended to attain. Such a power in the States could produce "nothing but discord and mutual irritation, and they very "clearly do not possess it."

In Henderson *vs.* Mayor of New York, 92 U. S., 257, in which the decision in the Passenger Cases was carefully considered andaffirmed, Mr. Justice Miller, in delivering the opinion of the court, said:—

"The transportation of a passenger from Liverpool to the "city of New York is one voyage. It is not completed until "the passenger is disembarked at the pier in the latter city. "A law or a rule emanating from any lawful authority which "prescribed terms or conditions on which alone the vessel "can discharge its passengers is a regulation of commerce."

In Guy *vs* Baltimore, 100 U. S., 434, an ordinance of Baltimore, whereby vessels laden with products of other States were required to pay wharfage fees, not exacted from vessels

laden with the products of Maryland, was held unconstitutional. Mr. Justice Harlan, in delivering the opinion of the court, says :—

"The city of Baltimore if it chooses can permit the pub-
"lic wharves which it owns to be used without charge. Under
"the authority of the State it may also exact wharfage fees
"equally from all who use its improved wharves, provided
"such charges do not exceed what is fair remuneration for the
"use of its property. But it cannot employ the property it
"thus holds for public use so as to hinder, obstruct, or bur-
"den interstate commerce in the interest of commerce wholly
"internal to that State. * * * The wharf at which appel-
"lant landed his vessel was long ago dedicated to public use.
"The public, for whose benefit it was acquired, or who are
"entitled to participate in its use, are not alone those who
"may engage in the transportation to the port of Baltimore of
"the products of Maryland. It embraces necessarily all en-
"gaged in trade and in commerce upon the public navigable
"waters of the United States. Every vessel employed in such
"trade and commerce may traverse those waters without let
"or hindrance from local or State authority, and the National
"Constitution secures to all so employed, without reference to
"the residence or citizenship of the owners, the privilege of
"landing at the port of Baltimore with any cargo whatever
"not excluded therefrom by or under authority of some stat-
"ute in Maryland enacted in the exertion of its police powers."

In The Railroad Company *vs.* Husen, 95 U. S., 465, where a statute prohibiting the driving of Texas cattle into the State in certain seasons or the transportation across the State excepting under certain regulations was held unconstitutional, Mr. Justice Strong says :—

"Whatever may be the power of a State over commerce that
"is completely internal, it can no more prohibit or regulate
"that which is interstate than it can that which is with
"foreign nations. Power over one is given by the Constitution
"of the United States to Congress in the same words in
"which it is given over the other, and in both cases it is ne-
"cessarily exclusive. That the transportation of property

"from one State to another is a branch of interstate com-
"merce is undeniable, and no attempt has been made in this
"case to deny it."

In Cook *vs.* Pennsylvania, 97 U. S., 566, where it was held that a tax upon the amount of sales of goods was a tax on the goods sold, and that a tax on the sales of goods in the original packages was a duty on imports, it was said by Chief Justice Miller:—

"In granting to Congress the right to regulate commerce
"with foreign nations and among the several States and with
"the Indian tribes, and in forbidding the States without the con-
"sent of that body to levy any tax on imports, the framers of
"the Constitution believed that they had sufficiently guarded
"against the dangers of any taxation by the States which
"would interfere with the freest interchange of commodities
"among the people of the different States, and by the people
"of the States with citizens and subjects of foreign govern-
"ments."

In Sweatt *vs.* Boston H. & E. R. R., 3 Cliff, 339, it was held that railroads transporting goods from one State to another were commercial corporations within the meaning of the bankrupt act.

In Telegraph Company *vs.* Texas, 105 U. S., 464, it was held that a tax on messages sent out of the State was a regulation of interstate commerce.

"In Welton *vs.* The State of Missouri, 91 U. S., 275, it was said by Mr. Justice Field:—

"The fact that Congress has not seen fit to prescribe any
"specific rules governing interstate commerce does not affect
"the question. Its inaction upon this subject when considered
"with reference to its legislation with respect to foreign com-
"merce, is equivalent to a declaration that interstate com-
"merce shall be free and untrammeled."

In Pullman Southern Car Company *vs.* Nolan, 22 Federal Reporter, 279, a corporation in another State hired its sleeping cars to carry passengers across the State in interstate transportation. Mr. Justice Matthews decided that a law of Tennessee enacting that to do this business was a privilege,

for which a license of seventy-five dollars for every car run should be paid, was unconstitutional. In his opinion, inasmuch as the cars had no *situs* in the State in which they were taxed, and were only found there because engaged in the business of interstate transportation, they were not within the taxing power. He held:—

"If a tax upon the person or thing carried is a regulation "of commerce forbidden to the States, it seems impossible to "escape the conclusion that a tax imposed as the price of the "privilege of being carried is equally such a regulation. It is "immaterial whether the privilege granted or withheld is "attributable to the carrier, or to that which he is engaged in "carrying. In both cases it is a burden upon the transporta-"tion and a tribute levied directly upon commerce itself."

In Woodruff *vs.* Parham, 8 Wallace, 138, it was held that freedom of travel of goods and persons between one State and another was secured by the Constitution. It was said:—

"It has been repeatedly held that the constitutionality or "unconstitutionality of a State tax is to be determined not "by the form or agency through which it is to be collected, "but by the subject upon which the burden is laid."

In Cannon *vs.* New Orleans, 20 Wallace, 577, it was said by Mr. Justice Miller: "It is perfectly clear that a duty, tax or "burden imposed under the authority of the State, which is, by "the law imposing it, to be measured by the capacity of the "vessel, and is in its essence a contribution collected for the "privilege of arriving and departing from a port of the United "States, is within the constitutional prohibition."

It is impossible to discriminate between a tax on the transporter because he transports, and one upon the transportation itself. In both cases the result is a tax upon the transportation. Would the tax in the case of State Freight, 15 Wallace, 232, which was held illegal because a railroad company, though a domestic corporation, was obliged to pay a certain sum for each ton of United States freight transported, have been less illegal if it had been fixed at the probable annual aggregate of such sums, and had been required to be paid annually by the corporation because it carried so many tons of freight?

As to the fourth proposition.

The right to tax rests upon an equivalent in protection or privileges granted. A State may tax the persons and property within its limits, because it protects them. Where franchises are granted, or a privilege is given, compensation may be demanded therefor. If the State of Pennsylvania had a right to forbid the ferry company from transacting its business, it could have demanded from it an equivalent for the privilege of conducting it. The slip or dock into which its boats were run was of course liable to taxation by the State of Pennsylvania, but it did not belong to the corporation, which possessed nothing but a lease without value, nothing but a tool of its trade.

If the State of Pennsylvania can tax individuals or corporations for the privilege of landing, and taking up, passengers and freight, in transit over the river Delaware, it can forbid the transportation altogether. Will it be seriously contended that it is within the power of that Commonwealth to forbid the landing of passengers and freight, arriving from another State, excepting upon the terms of paying such amounts as it may see proper to exact? If the State of Pennsylvania may do this, every other State has the like power, and commerce will be rendered impossible. What equivalent was given by the State of Pennsylvania to the plaintiff in error for the tax which has been adjudged to it? The privilege of doing what it could not prevent? There are no Chinese walls between the various States of this Union. The river Delaware is a highway over which all the citizens of the United States may cross without impediment. The privilege of crossing is of no avail if it does not involve the right of landing. The right to cross and to land is of little avail, unless it involves the right to use such instrumentalities as are requisite. A tax imposed upon these instrumentalities, simply because they are employed in the business of transportation, is a tax upon the transportation itself.

Commercial intercourse is guaranteed by the Constitution of the United States. It cannot be forbidden by any State of the Union. All individuals and corporations are entitled to do everything which is necessary to facilitate this intercourse.

They do not derive their rights thus to facilitate it from any of the States, and are therefore not subject to a tax because they exercise it.

In Grover & Baker Sewing Machine Company *vs.* Butler, 53 Ind., 454, it was held that provisions respecting foreign corporations, requiring them to comply with certain conditions as a prerequisite to transact business, did not apply to a foreign corporation owning a patent right and engaged solely in the manufacture, use and sale of patented articles. It was said by Howk, J.: "If the facts stated in the reply are true, "and if well pleaded, their truth is admitted by appellee's "demurrer to the reply, then at the time of the sale of the "sewing machine to appellee, and at the time of the execution "of the note sued upon, the appellant undoubtedly held under "the Constitution of the United States, and the acts of Con- "gress pursuant thereto, the full and exclusive right to make, "use and vend in this State, the sewing machines mentioned "in its letters patent. Now the question arises, was that right "so held by appellant, a foreign corporation, affected in any "manner by the provisions and requirements of the law of "this State before mentioned, respecting foreign corporations "and their agents in this State? * * * If the patentee "complies with the law of Congress on the subject, he has a "right to go into the open market anywhere within the United "States and sell his property. If this were not so, it is easy "to see that a State could impose terms which would result in "a prohibition of the sale of this species of property within "its borders. * * * Where a foreign corpora- "tion is the owner, either as patentee or assignee, of letters "patent issued by the United States, and the transactions of "such corporation in this State are connected with the manu- "facture, use or sale of the invention described in such let- "ters patent, we hold that the provisions and requirements of "the act of this State entitled, &c., do not apply to such for- "eign corporations."

This was affirmed in Shook *vs.* The Singer Sewing Machine Company, 61 Ind., 520.

The like point was held by Mr. Justice Davis in *Ex parte* Robinson, 2 Biss., 309.

In City of Council Bluffs *vs.* K. & C. Railroad, 45 Iowa, 338, it was held that a statute requiring railroad companies connecting with the Union Pacific Railroad to transport freight at Council Bluffs was void, as a regulation of commerce.

In The Lehigh & Wilkesbarre Coal Company *vs.* Carrigan, 39 N. J., page 35, a foreign corporation, whose business was the mining of coal in Pennsylvania, which was sent by railroad across the State of New Jersey to tidewater for shipment to customers in other States, and whose office for receiving orders for coal and transacting its business was in New York City, was held not to be taxable for coal lying on its dock which was delayed within the State of New Jersey awaiting shipment to other States. And it was held that such corporation was not taxable for coal shipped direct from its mines and delivered in the State of New Jersey in cars to local dealers on orders transmitted through its office in New York City.

In Hays *vs.* The Pacific Mail Steamship Company, 17 Howard, 597, it was held that steamships owned by a New York corporation, plying between New York and San Francisco, were not taxable in California.

In Gibbons *vs.* Ogden, 9 Wheaton, page 1, it was said by Chief Justice Marshall:—

"But in regulating commerce with foreign nations the "power of Congress does not stop at the jurisdictional lines of "the several States. * * * If Congress has the power "to regulate it, that power must be exercised wherever the "subject exists. If it exists within the State—if a foreign "voyage may commence or terminate at a port within a State "—then the power of Congress may be exercised within a State. "This principle is, if possible, still more clear, when applied to "commerce among the several States. They either join each "other, in which case they are separated by a mathematical "line, or they are remote from each other, in which case other "States lie between them. What is commerce among them, "and how is it to be conducted? Can a trading expedition "between two adjoining States commence and terminate out-"side of each? And if the trading intercourse be between

"two States remote from each other, must it not commence in "one, terminate in the other, and probably pass through a "third? * * The power of Congress, then, whatever it may "be, must be exercised within the territorial jurisdiction of "the several States."

In Brown *vs.* Maryland, 12 Wheaton, 419, a State statute requiring importers of foreign merchandise, and other persons selling the same, to take out license, was held unconstitutional. It was said by Chief Justice Marshall:—

"Any charge on the introduction and incorporation of the "articles into and with the mass of property in the country "must be hostile to the power given to Congress to regulate "commerce, since an essential part of that regulation and "principal object of it is to prescribe the regular means for "accomplishing that introduction and incorporation."

In conclusion we urge what we have said before, and what is averred over and over again in the cases we have cited, viz., that inter-state transportation of passengers or merchandise is exclusively within the control of Congress; and that it is the right of every person to insist upon such transportation without being subject to any tax thereon directly or indirectly.

Commerce requires divers instruments such as wharves, ferries, elevators, canals, railroads, warehouses, &c., &c. For the use of these a price may be exacted because such price is not a tax but a return for services rendered. Those who furnish these instruments are liable to be taxed by the State in which they are located, and though this may add to the expense of transportation the result is but an incident, and therefore not illegal, there being no tax upon the transportation itself. Wharves, ferries, &c., being matters of local concern, may be regulated, in the absence of congressional provisions, by the State in which they are located. License fees may be exacted as part of the general system of such regulation, under the police power.

No tax, however, can be exacted as a condition of the transportation or because of such transportation, inasmuch as the right to be transported involves a right in persons or

corporations, without any license from any State, to do whatever is necessary to make such right of transportation effectual. As neither the person nor the freight can be taxed directly the same thing cannot be done indirectly by forbidding any one to transport across navigable rivers unless a tax is paid for being allowed to do so. If it is competent for the State of Pennsylvania to compel a corporation to pay a tax to enable it to do business as an inter-state transporter, it is competent for it to compel individuals to pay a like tax. If it can tax at all it can tax without limit, and thus, it may defeat the right altogether.

JOHN G. JOHNSON,
For Plaintiff in Error.

IV. Dissenting Opinion Filed by Green, J., in the Supreme Court of Pennsylvania.

In my judgment the fundamental question in this case is whether the Legislature of Pennsylvania possesses the lawful power to impose the particular form of taxation sought to be enforced. The subject-matter of the proposed taxation is capital stock of a foreign corporation. The corporation defendant is established and exists by the law of New Jersey. Its entire capital is there held by persons who reside in that State. Its place of business, its officers, and all its property are within that jurisdiction. It has never received, or claimed, the benefit of any legislation of this Commonwealth. Have we the right in these circumstances to tax its capital stock? In the case of the State Tax on Foreign-held Bonds, 15 Wall., 300, it was held that "the power of taxation, however vast in "its character and searching in its extent, is necessarily limited "to subjects within the jurisdiction of the State. These sub-"jects are persons, property, and business. Whatever form "taxation may assume, whether as duties, imposts, excises, or "licenses, it must relate to one of those subjects. It is not "possible to conceive of any other, though, as applied to "them, the taxation may be exercised in a great variety of "ways." Now, in the present case, the proposed tax is levied upon a form of property—capital stock, and is not a tax upon persons, natural or artificial. It is not, specifically, a tax upon business. By the case stated, it is declared that it is a tax upon the capital stock of the corporation defendant, and it is agreed that if the court shall be of opinion that the defendant is not liable to pay a tax on its capital stock, judgment shall be entered in its favor. In view of these considerations, the question recurs, how can this tax be sustained? It is directly and specifically a tax upon capital stock which is neither in fact or law within the jurisdiction of the State of Pennsylvania. In the case of Maltby *vs.* Reading and Columbia Railroad Co., 2 P. F. S., 146, this court said: "It is undoubt-

"edly true that the Legislature of Pennsylvania cannot impose "a personal tax upon the citizens of another State, but the "constant practice is to tax property within our jurisdiction "which belongs to non-residents. * * * There must be "jurisdiction over either the property or the person of the "owner, else the power cannot be exercised; but where the "property is within our jurisdiction, and enjoys the protection "of our State government, it is justly taxable, and it is of no "moment that the owner who is required to pay the tax "resides elsewhere." See also St. Louis *vs.* The Ferry Co., 11 Wall., 430. It is clear to my mind that, viewed as a tax upon property which is not within the jurisdiction of this Commonwealth, the proposed tax is invalid.

But it is claimed that the corporation defendant does business within the Commonwealth, and, therefore, comes within the words of the fourth section of the Act of May 1, 1868, which imposes taxation upon the capital stock of all companies incorporated by the law of this Commonwealth, or of "any "other State, and lawfully doing business in this Common-"wealth." The conclusion is drawn, that because the defendant does within our limits, the tax upon its capital stock is lawful for the reason that the statute authorizes it. It will be perceived that this conclusion is not legitimate, unless, as to this particular case, the statute is a valid exercise of legislative power. Without that element, the words of the statute, as to the present controversy, are merely nugatory, and hence, we are at once and necessarily remitted to the inquiry, can the Legislature lawfully impose such a tax? It may be conceded that, as a general rule, if the particular business done, is done by virtue, or, indeed, by permission of legislative authority, the right to tax exists. For then, there is a subordination of the corporate action to the legislative will, which carries with it the power of prescribing the terms upon which the corporate action shall be exercised. This would certainly apply to all cases in which the right to come within the territorial limits of the State, and construct buildings or work of any kind, and carry on business, is conferred upon foreign corporations. When such corporations accept such privileges, they of course

become subject to the jurisdiction and supervision of the legislative authority from which those privileges are obtained. But this doctrine fails of application if the particular business done does not depend upon either the express or implied consent of the legislative authority of the territory where it is conducted. This leads us to consider the character of the business done by the corporation defendant. In the case stated, this subject is thus described: "It (the defendant) has never "transacted any other business saving that of ferrying passen- "gers and freight across said river, between said town and "city." The points between which this carriage of freight and passengers transpires are the town of Gloucester, in the State of New Jersey, and the city of Philadelphia, in the State of Pennsylvania, the space traversed is the water of the river Delaware, and the means employed are steam ferry boats. The waters of the river Delaware at the port of Philadelphia constitute one of the highways of nature, and the commerce of all the States, indeed, of all the world, may traverse them without the necessity of obtaining the consent of the Legislature of Pennsylvania. When the ferry boats of the defendant touch the territory of Pennsylvania at their landing-place in Philadelphia, they are in contact with our soil, but they have not traversed any portion of it. The surface of the river being that of a public navigable stream does not belong to the coterminous States in the sense of exclusive ownership, whatever may be the title to the bed underneath. In the case of St. Louis *vs.* The Ferry Co., 11 Wall. 423, it was held that the ferry boats of a corporation incorporated in one State, and carrying passengers and freight forward and back across a river to a city situated in another State, are not taxable under a law taxing boats within the city, in a case where the relation of the boats to the city was simply that of contact as one of the *termini* of the voyage. In this case the boats plied between East St. Louis, in the State of Illinois, where the Ferry Company was incorporated, and the city of St. Louis, in the State of Missouri. On page 431, in speaking of the relation of the boats to the city, the court say: "Their relation to the city "was merely that of contact there, as one of the *termini* of their

"transit across the river in the prosecution of their business." This being so, it is evident that, in traversing the river, the boats of the defendant are not to be regarded as in the use and occupancy of any part of the soil of the State. Is then the discharge and receipt of passengers and freight on and from the wharf at Philadelphia such a transaction of business within our territory as subjects the parties engaged in it to State taxation for the exercise of the privilege? In other words, may a State impose taxation, either directly or indirectly, upon traffic between the States? I am clear that such a power does not exist, because it would be in direct contravention of at least two distinct provisions of the Federal Constitution: 1. That which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." 2. That which declares that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

It cannot be questioned that the transportation of freight and passengers over navigable waters in vessels is commerce in its most essential features. In Brown *vs.* The State of Maryland, 12 Wheat., 419, Chief Justice Marshall, in defining commerce, said: "Commerce is intercourse; one of its most ordi- "nary ingredients is traffic." Again, in Gibbons *vs.* Ogden, 9 Wheat., 1, he said:" Commerce undoubtedly is traffic, but it is "something more, it is intercourse. It describes the commer- "cial intercourse between nations and parts of nations in all its "branches, and is regulated by prescribing rules for carrying "on that intercourse." * * * "The power over com- "merce, including navigation, was one of the primary objects "for which the people of America adopted their government, "and must have been contemplated in forming it." * * * "The word used in the Constitution there comprehends, and "has been always understood to comprehend, navigation "within its meaning, and a power to regulate navigation is as "expressly granted as if that term had been added to the word "'commerce.'" * * * "The subject to which the word is "next applied is to commerce 'among the several States.'

"The word 'among' means intermingled with. A thing which "is among others is intermingled with them. Commerce among "the States cannot stop at the external boundary line of each "State, but may be introduced into the interior." These judicial definitions are sufficiently precise to establish that the word "commerce," as used in the federal Constitution, imports and includes intercourse and traffic between the States of the Union over navigable waters, as well as between the States and foreign countries. It follows, as was held in the cases cited and in other cases, that the power to regulate inter-State commerce resides in the federal government and not in the States, and therefore the right to conduct this commerce or traffic does not depend upon the will of the States, but may be exercised altogether independently of them. Chief Justice Marshall said, in the case last cited: "The power of Congress, "then, comprehends navigation within the limits of every State "in the Union, so far as that navigation may be in any manner "connected with commerce with foreign nations, or among the "several States, or with the Indian tribes." "It may, of "consequence pass the jurisdictional line of New York, and act "upon the very waters to which the prohibition now under "consideration applies." While it is undoubtedly true that commerce among the States is a subject of congressional regulation and control, it is also true that a great variety of legislation by the States may lawfully be applied to it. These are ordinarily called police regulations, and are known as inspection laws, quarantine laws, health laws, and others of a similar character, and they are clearly defined by Agnew, J., in the opinion of this court, in the case of Craig *vs.* Kline, 15 P. F. S., 399. But the power to impose taxation in any form upon inter-State commerce has been uniformly held by the Supreme Court of the United States, and by several of the State courts of last resort, to reside in Congress alone. Accordingly, in whatever form the question has arisen, and with whatever degree of indirectness, State taxation has been imposed upon either foreign or inter-State commerce, it has been always rejected by the supreme judicial authority of the land as an incompetent exercise of legislative power by the States.

In the case of McColloch *vs.* The State of Maryland, 4 Wheat., 316, it was held, that the Legislature of Maryland had no power to impose taxation upon the circulation of the Bank of the United States, which had established a branch in that State. The following propositions, amongst others, were ruled in that case:—

The Bank of the United States has constitutionally a right to establish its branches or offices of discount and deposit within any State.

The State within which such branch may be established cannot, without violating the Constitution, tax that branch.

The State governments have no right to tax any of the constitutional means employed by the government of the Union to exercise its constitutional powers.

The States have no power by taxation or otherwise to retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government.

In the case of Brown *vs.* The State of Maryland, 12 Wheat., 419, it was held, that an Act of a State Legislature, requiring all importers of foreign goods by the bale or packages, &c., and other persons selling the same by wholesale, bale or package, &c., to take out a license for which they shall pay fifty dollars, and, in case of neglect or refusal to take out a license, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the Constitution of the United States which declares that "no State shall, without the consent "of Congress, lay any impost or duty on imports or "exports, except what may be absolutely necessary for exe- "cuting its inspection laws," and to that which declares that Congress shall have power "to regulate commerce with "foreign nations, and among the several States, and with the "Indian tribes." It will be perceived that the Act in question, of the State of Maryland, simply required importers of foreign goods to take out and pay for a State license before selling their imported goods. But it was held that the license fee was, in practical effect, the equivalent of a duty on imports, and that it was also a restriction upon foreign commerce,

and therefore came in conflict with both the constitutional provisions above stated. The Chief Justice reasoned thus: "There is no difference in effect between a power to prohibit "the sale of an article and a power to prohibit its introduction "into the country. The one would be a necessary conse- "quence of the other. No goods would be imported if "none could be sold. No object of any description can "be accomplished by laying a duty on importation, which "may not be accomplished with equal certainty by "laying a duty on the thing imported in the hands "of the importer. It is obvious that the same power "which imposes a light duty can impose a very heavy "one—one which amounts to a prohibition. Questions of "power do not depend on the degree to which it may be exer- "cised. If it may be exercised at all, it must be exercised at the "will of those in whose hands it is placed." It seems to me that this reasoning is entirely applicable to the case at bar. If the business done by the defendant may be used as a means of imposing a tax not otherwise lawful, and yet this business is not subject to the taxing power of the State, then all inter-State commerce, and, indeed, foreign commerce also, becomes dependent upon the will of the States, and may be controlled and even prohibited by them, though in clear violation of the constitutional provisions. If Pennsylvania may impose a tax on the capital stock of a foreign navigation company because one of its vessels touches at one of her ports, and there discharges and receives passengers and freight, then every other State at whose ports other vessels of that company may transact the same kind of business, may impose the same tax. Or if the same vessel touches at different State ports on our coast, the entire capital stock of the company owning her may be taxed at each port, and thus the whole commerce conducted by such company may be destroyed. The case of Brown *vs.* Maryland, above cited, proves that it is not at all necessary to show that such results have followed or will follow; it is enough to show that they are possible. In discussing the clause relating to the regulation of commerce, Chief Justice Marshall further says: "If the

"States may tax all persons and property found on their ter-
"ritory, what shall restrain them from taxing goods in their
"transit through the State from one port to another for the
"purpose of re-exportation." * * * "Or from taxing
"the transportation of articles passing from the State itself to
"another State for the purpose of traffic." Here is a direct denial of the right to do the very thing which is sought to be done in the present case, to wit, taxing the transportation of artícles from State to State. It matters not that it is indirectly done. The result is precisely the same as if done directly. It cannot be that a State may tax the capital stock of a corporation *because* it does a certain kind of business, when the business itself is not within the power of State taxation. In the case of McCulloch *vs.* Maryland, before quoted, the Chief Justice said: "That the power to tax involves the power to
"destroy; that the power to destroy may defeat and render
"useless the power to create; that there is a plain repugnance
"in conferring on one government a power to control the con-
"stitutional measures of another, which other, with respect to
"those very measures, is declared to be supreme over that
"which exerts the control, are propositions not to be denied."
In the case of Gibbons *vs.* Ogden, 9 Wheat, 1, the following propositions were declared:—

The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States.

The power to regulate commerce is general, and has no limitation, but such as are prescribed in the Constitution itself.

The power to regulate commerce, so far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a State.

The power of regulating commerce extends to navigation carried on by vessels exclusively employed in transporting passengers.

Chief Justice Marshall, in the course of his opinion, says:
"Vessels have always been employed, to a greater or less

"extent, in the transportation of passengers, and have been "supposed to be, on that account, withdrawn from the control "or protection of Congress."

In Cooley's Constitutional Limitations, 591, the writer says: "Congress is empowered to regulate commerce with foreign "nations and among the several States, and wherever a river "forms a highway upon which commerce is conducted with "foreign nations, or between States, it must fall under the "control of Congress, under this power over commerce."

In the Passenger Cases, 7 Howard, 283, it was held that a State law which requires the masters of vessels engaged in foreign commerce to pay a certain sum to a State officer, on account of every passenger from a foreign country into the State, or before landing any alien passenger in the State, is inoperative by reason of its conflict with the Constitution and laws of the United States.

This was a much-contested case, and there was a wide difference of opinion among the judges who decided it. Several of them, regarding the laws in queston as police regulations and health laws, dissented and held them to be within the power of the State; but the decision of the majority was the other way, and has received the assent of the bench and bar of the country to the present time. McLean, J., in delivering the opinion of the majority, said: "Commerce is defined to "be 'an exchange of commodities.' But this definition does "not convey the full meaning of the term. It includes 'navi-"'gation and intercourse.' That the transportation of passen-"gers is a part of commerce is not now an open question." The decision of the cause was put upon the ground that the transportation of passengers was a part of commerce, and therefore it was subject to federal control and regulation, and it was not competent for a State to impose taxation upon it in any form.

In the case of Hays *vs.* Pacific Mail Steamship Co., 17 How., 596, it was held that an ocean steamer, owned and registered in New York, and regularly plying between Panama and San Francisco and ports in Oregon, remaining in San Francisco no longer than is necessary to land and receive

passengers and cargo, and in Benicia only for repairs and supplies, is not subject to taxation by the State of California. One of the reasons for the decision is thus stated in the opinion of the court: "Now, it is quite apparent that if the State "of California possessed the authority to impose the tax in "question, any other State in the Union, into the ports of "which the vessels entered in the prosecution of their trade "and business, might also impose a like tax."

In the case of Crandall *vs.* State of Nevada, 6 Wall., 35, it was decided that a special tax on railroad and stage companies for every passenger carried out of the State by them is a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel, and while it was not a tax on the business of the companies, and was not in conflict with the provisions of the Constitution forbidding a State to lay a duty on exports, nor with the provision conferring on Congress the power to regulate commerce, yet it was void under the Federal Constitution as interfering with the rights, both of the United States to have the attendance of citizens at all points where the functions of government are to be performed, and of the citizens themselves to enjoy the free right of transit by the ordinary means of travel through the several States.

It will be observed that in this case the tax was a local one imposed upon local companies within the State jurisdiction, and upon business done within the State. Thers was no express provision of the Federal Constitution with which the legislation imposing a tax conflicted. Nevertheless, it was held void because it was indirectly, though not directly a tax on the privilege of free transit through the several States. Miller, J., on page 46, reasons thus: "But "if the State can tax a railroad passenger one dollar it can "tax him one thousand dollars. If one State can do this so "can every other State. And thus one or more States, cov-"ering the only practicable routes of travel from east to west, "or from the north to the south, may totally prevent or seri-"ously burden all transportation of passengers from one part "of the country to the other." On page 49, Justice Miller

quotes and adopts the following portion of the dissenting opinion of Chief Justice Taney on a point not disputed in the passenger cases: "We are all citizens of the United States, "and as members of the same community must have the "right to pass and repass through every part of it without "interruption as freely as in our own States. And a tax im- "posed by a State for entering its territories or harbors is in- "consistent with the rights which belong to citizens of other "States as members of the Union, and with the objects which "that Union was intended to attain. Such a power in the "States could produce nothing but discord and mutual irrita- "tion, and they very clearly do not possess it." In the case of the State Tax on Railway Gross Receipts, 15 Wall., 284, it was conceded throughout the opinion of the majority of the court that if the taxation there in question had been upon the transportation of freight from one State to another, it would have been invalid. Strong, J., on page 292, said: "We have "recently decided in another case between the parties to the "present suit, that freight transported from State to State is "not subject to State taxation because thus transported. Such "a burden we regard as an invasion of the domain of Federal "power, a regulation of inter-State commerce which Congress "only can make." In the case of Cannon *vs.* New Orleans, 20 Wall., 577, it was held that any duty, or tax, or burden imposed under the authority of the States, which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, and which is assessed on a vessel according to its carrying capacity, is a tonnage tax within the meaning of the Federal Constitution, and therefore void.

The ordinance in question in this case imposed "levee dues" on all steamboats mooring or landing at the port of New Orleans, and measured the amount by the tonnage of the vessels. It was decided that, although the levee dues were imposed as a compensation for the commercial facilities afforded by the city, and did not purport to be a duty on tonnage, yet the practical effect of their imposition was to create such a burden, and as the privilege of arriving and departing was the real

basis of the claim for dues, the ordinance was declared void, as being contrary to the Federal Constitution.

Thus we see that, in whatever manner or by whatever devices the right to transport passengers or freight from one State to another has been made the subject of State taxation of any kind or for any purpose, such taxation has been declared void, as contrary to the Federal Constitution. The validity of such taxation can not depend upon the character of the person exercising the right of transportation in question. It has been repeatedly held that a corporation is a citizen of the State by whose law it was created. But whether the person exercising the right of transportation under consideration be natural or artificial, the applicability of the constitutional prohibition must be the same in either case.

It is equally immaterial that a wharf is leased in Philadelphia by the defendant on which its business of discharging and receiving passengers and freight is conducted. The use of such a wharf is a mere incident to the business, and can in no sense suffice to remove the fundamental invalidity of the proposed taxation. That taxation is void, because the State has no power to impose it upon anybody, or in any circumstances, or for any cause.

I cannot assent to the position that the defendant becomes subject to a right of taxation by the Legislature of Pennsylvania because it exercises its functions within our territory by implication, under the law of international comity. Such implication might justify a taxation which could be lawfully imposed, but it cannot suffice to remove the taint of absolute invalidity. A right to tax cannot exist by mere implication when it could not be exercised by direct legislation. If our legislature should pass a law imposing directly a tax upon the transportation of passengers and freight between the States of New Jersey and Pennsylvania, it would undoubtedly be void as contrary to the Federal Constitution. No such power exists in the States. But if a State cannot impose such taxation by express enactment, of course it cannot do so by any species of implication. I am of opinion that the taxation sought to be imposed in the present case cannot be sustained, because,

First.—As a tax upon capital stock specifically it is invalid for want of jurisdiction.

Second.—As a tax upon capital stock by reason of business done within the Commonwealth, the particular business done being the transportation of freight and passengers over public navigable waters from one State to another, is not within the power of State taxation, and hence our act of 1868 is inapplicable to the case.

For these reasons I feel obliged to dissent from the opinion of the majority of the court reversing the opinion of the court below.

11496

JAN 29 1885
JAMES H. McKENNEY,
CLERK

No. 185. *October Term, 1884.*

In the Supreme Court of the United States.

The Gloucester Ferry Company,
Plaintiffs in Error,

vs.

The Commonwealth of Pennsylvania,
Defendants in Error.

Error to the Supreme Court of Pennsylvania.

SUPPLEMENTAL BRIEF FILED ON BEHALF OF THE PLAINTIFFS IN ERROR.

PRESENTED BY

MORTON P. HENRY.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

The Gloucester Ferry Company, Plaintiffs in Error,

vs.

The Commonwealth of Pennsylvania, Defendants in Error.

October Term, 1884.

No. 185.

SUPPLEMENTAL BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

Preliminary.

In the dissenting opinion filed in the Supreme Court of Pennsylvania, which, by the procedure of that court, does not become part of the record. Mr. Justice Green points out to his brethren, with considerable care, the inconsistency of this decision with those of the Supreme Court of the United States.

It is unnecessary to cite in this court authorities to show that taxation is a regulation of commerce under the commercial clause of the Constitution; nor how rigorously since Gibbons *vs.* Ogden, the right of the States to interfere with or abridge the right of navigation conferred on shipping under the navigation laws of the United States, is refused.

And it is not denied in the opinion of the majority of the Supreme Court of Pennsylvania.

But it is held, that as a State is under no obligation to admit a foreign corporation within its limits, these rules do not apply to commerce conducted in vessels owned by such corporations, and as the State therefore can exclude a corporation and its vessels, it can impose whatever terms it pleases, as the price of their admission to a port or place in Pennsylvania, and "that there has been a great deal of learning wasted in "this case in the endeavor to assimilate the rights of this cor- "poration to those of individual citizens, when in fact they "are totally dissimilar and based upon principles totally "different."

This raises the only substantial question in the case, whether vessels duly licensed and enrolled under the navigation laws of the United States, if owned by a corporation, can be excluded from visiting the port of another State by the authorities of such port, and therefore are admitted only on the terms of the owner, submitting its capital stock to taxation by Pennsylvania.

It is a very important question to very large interests; for nearly every steam vessel of any size in the coasting and foreign trade of the United States is owned by corporations or by foreign joint stock and limited companies which are treated as such under our laws. And while self-interest will probably prevent State governmects from destroying the commerce by water of their ports; it is yet unquestionable that the mere suggestion of the existence of such a distinction between steamship companies and other vessel owners, will make capital hesitate to embark in investments requiring its aggregation in corporations, to own vessels of an expensive class; if vessels so owned can be excluded from the port of another State by the authority of its legislature or executive.

I. Although the principle is treated as self-evident under the rule in The Bank of Augusta *vs.* Earle, 13 Peters, 19, it is to be remarked that the court in referring, by way of illustration, to the right of the States to exclude foreign insurance companies (Paul *vs.* Virginia, 8 Wallace, 112), on the ground that insurance such as was taxed by the State in that case, did not

come within the meaning of the word "commerce" as used in the Constitution of the United States. It failed to notice that this court in its opinion admitted that the commercial clause of the Constitution embraced commerce conducted by corporations as well as by individuals; and in the succeeding case of Doyle *vs.* The Ins. Co., 4 Otto, at page 544, the necessity of some modification of the rule is adverted to as to such a business as is everywhere conducted through the agency of corporations in the dissenting opinion, in which three of the justices of this court concurred.

But what was a dictum in Paul *vs.* Virginia has passed into decision, in Telegraph Co. *vs.* Texas, 15 Otto, 460, where The Western Union Telegraph Company, a corporation created under the laws of New York, obtained protection under the commercial clause of the Constitution against taxation by the State of Texas.

In the Inman S. S. Co. *vs.* Tinker, 4 Otto, 235, where the Inman Steamship Company, an English corporation, was relieved from a tax imposed by the State of New York based upon tonnage.

So taxation by California of vessels owned by New York corporations, which ran in a regular line to San Francisco, was held invalid in The Pacific M. S. S. Co. *vs.* Hay, 17 How., 596.

In Henderson *vs.* the Mayor of New York, 92 U. S., 257, the inequality of a tax on passengers landed at New York was also decided to be the rule as to vessels owned by the North German Lloyds, a well-known steamship company.

In the S. S. Co. *vs.* Port Wardens, 6 Wall., 31, a port charge under the laws of Louisiana was held invalid as to The Southern Steamship Company, a corporation created by Louisiana.

In each of these cases the principles on which the State is allowed by the decision of the Supreme Court of Pennsylvania to interdict commerce with their ports, by vessels owned by corporations of other States, would have produced the opposite result in the decisions rendered by this court and it can scarcely be that so self-evident an element was overlooked

by counsel or court, or that the application of these rules to foreign corporations was by judicial inadvertence.

Whatever can be said as applying to vessels owned by corporations of foreign origin, comes with double force as to vessels owned by corporations of the American States.

For a State can create a corporation to build a ship, or own a ship, but it cannot authorize it, or even an individual, to use one. The authority of a vessel to leave or enter a port of a State, is under the navigation laws of the United States, which expressly provide for the registry of vessels owned by incorporated companies, as a part of the commercial marine of the United States, and not of the State. (Revised Statutes, section 4137; see remarks of Bradley, J., in Crapo *vs.* Kelley, 16 Wall., 310.) And while the regulation of internal commerce between man and man in the same State is purely one of State concern, the definition of domestic commerce is now limited to such cases, where neither the destination of goods or passengers is beyond the State, and is further restricted, where the voyage between limits in one State, requires the vessel to go on the ocean. Lord *vs.* The Steamship Co., 102 U. S. R., 541; and the State authorities it is decided cannot, in such cases, regulate by law the transportation by water of the corporation they have themselves created. Pacific Coast S. S. Co. *vs.* Board of R. R. Com's., 18 Fed. Rep., 10.

Discriminations have been made as to taxation of the receipts of railways operated within the State, the gross receipts of which earned on freight carried in the State may be taxed, and such tax is not a violation of these rules. This is the case of the tax on gross receipts, 15 Wallace, 284, yet it cannot tax the goods carried, if the property of citizens of other States. The Freight Tax Case, 15 Wallace, 232.

The principle on which these two cases rest is explained with great perspicacity in the subsequent case of Railroad Co. *vs.* Maryland, 21 Wallace, page 470, in which the right of the State to tax the traffic receipts of its own railroad is shown to arise from the fact that such corporations are built under the road-making power of the State. The exercise of such a franchise comes essentially within the definition of a "royal privilege in the hands of a subject."

Like turnpikes they are highways of the State; they take the same tolls which the State itself could take, and the tax is a compensation for the franchise enjoyed.

The distinction between such a tax and a tax on commerce conducted by water is pointed out in the language of that case.

"Commerce on land between the different States is so "strikingly dissimilar in many respects from commerce on the "water, that it is often difficult to regard them in the same "aspect in reference to the respective constitutional powers "and duties of the State and Federal government. No doubt "commerce by water was principally in the minds of those "who formed and adopted the Constitution, although both "its language and spirit embrace commerce by land as "well. Maritime transportation requires no artificial high-"way. Nature has prepared to hand that portion of the "instrumentality employed. The navigable waters of the "earth are recognized public highways of trade and inter-"course. No franchise is needed to enable the navigator to "use them. Again the vehicles of commerce by water being "instruments of intercommunication with other nations, the "regulation of them is assumed by the National Legislature, "so that State interference with transportation by water, and "especially by sea, is at once clearly marked and distinctly "discernible, but it is different with transportation by land."

This closes the part, which is presented by permission, in the interest of other corporations subjected to similar suits to that which has been successfully maintained in the present cause.

The right to tax the corporate property of this company on any other ground than because it is a corporation of another State is not asserted.

For mere contact with a State does not render vessels liable to taxation by every State the vessel visits in the course of its voyage, even at regular or short intervals. St. Louis Ferry Co. *vs.* Wallace, 11 Wallace; Hays *vs.* The S. S. Co., 17 Howard, 596. And this is for such essential reasons as cannot be disputed; and it is difficult to see any possible distinction

which can be raised between the latter case and the present one. The cases cited are believed to show that the distinction drawn as to commerce conducted by corporations and individuals could not have been overlooked in the decisions of this court.

II. The act of Pennsylvania and the judgment in this case is not supported in the opinion filed by any reference to the decisions of this court on the right of the States to regulate the business or occupation of ferriage in navigable rivers dividing different States.

The decisions would not support this tax on capital of a ferry company, the situs of which is elsewhere. No reasoning, nor the rule derived from those cases would sustain a judgment that a corporation of ferrymen or its property is governed by different rules as to subjection to taxation from that of individuals.

Wiggins Ferry Co. *vs.* East St. Louis, 107 U. S. R., 365, is the latest case in which a license fee imposed on each boat of a ferry company, whose occupation was on a river between two States, was held not to be a violation of the Constitution by reason of the boats being licensed under the navigation laws of the United States.

The court says, at page 376, "The license fee exacted is "in effect laid upon the business of keeping a ferry—for it is "not laid upon all boats owned by the ferry-keeper, but only "on those plying between the two banks of the river, and is "graduated by the number of boats used by him. The exac- "tion of this license fee is identical in time with the imposi- "tion upon a proprietor of hacks and express wagons of a "specified sum for every vehicle owned."

And at page 377 :—

"These authorities show that the enrollment and licensing "of a vessel under the laws of the United States does not of "itself exclude the right of a State to exact a license from her "own citizens on account of their ownership and use of such "property having its situs *within the State.*"

As in Conway *vs.* Taylor, 1 Black., 603, the court did not give such an effect to a license to a steam ferry-boat, under

the same navigation laws, as would authorize the owner of the ferry-boat to violate the exclusive right of ferriage, given by the laws of Kentucky to a riparian owner whose rights were secured by the State law.

The taxation by licenses imposed on ferrymen is the same as that allowed on express companies, in Osborne *vs.* Mobile, 16 Wall., 479, which are not taxes upon commerce where they are imposed as part of the local taxation of a town or county, equally on its citizens as well as foreigners.

But it is only as licenses on the business conducted in a place, that they can be sustained. A State cannot support its government by such licenses. Steamship Co. *vs.* Port Wardens, 6 Wall., 31. Every vessel entering a port or locality becomes subject to the law of the port, and those regulations, which are of port or local concern; but such transitory contact in the course of business does not subject the owner to all the laws of the State; so as to bring all the property of a corporation, the situs of whose ownership is elsewhere, within the operation of the revenue laws of the country, and thus subject the foreign owners of steamships coming into such ports as New York, or those of other States, to the laws of such States. St. Louis *vs.* The Ferry Co., 11 Wallace, 423.

The lines of demarcation between the taxation of property situated elsewhere, and a license to transact a business in a locality, at times become indefinite, as each affects its use; but this taxation is too well defined to need discrimination as to its character. It attempts to support the government of Pennsylvania out of capital of a stranger invested in steamboats owned and real estate situated elsewhere. Police powers have been defined to be such, which do not interfere with, but are an aid to commerce. (Field, J., in County of Mobile *vs.* Kimball, 100 U. S. R., at p. 697 *et seq;* Wharton's Commentaries on American Law, sec. 423–4; and within this category come wharfage, levee dues, pilotage, quarantine laws, and every aid which commerce or business may require, and which Congress cannot or does not afford.

The best definition that can be given is that a State cannot exact a fee as a license for doing that which the vessel has a

right to do; but it can as a compensation for assisting the vessel "landing within its limits." Steamship Co. *vs.* Port Wardens, 6 Wall., 31; Cannon *vs.* New Orleans, 20 Wallace, at page 582, provided it is equally compulsory on its own citizens and the stranger. Gay *vs.* Baltimore, 100 U. S. R., 434. But in no case can an aid to commerce or a rightful subject of taxation be found, in subjecting to the general lawsof a State for the benefit of the State government (Steamship Co. *vs.* Port Wardens, *ante*), all the property of citizens of other States visiting transitorily the territory of another State for purposes of interstate commerce. Morgan *vs.* Parham, 16 Wall., 471. It is only sustained by the Supreme Court of Pennsylvania because they can prohibit such commerce by vessels if owned by corporations.

MORTON P. HENRY.

11496

NO. 185. OCTOBER TERM, 1884.

IN THE SUPREME COURT OF THE UNITED STATES.

The Gloucester Ferry Company,
Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania,
Defendant in Error.

PHILADELPHIA LAW ASSOCIATION

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

Brief of Argument on behalf of Plaintiff in Error.

Submitted by

M. E. OLMSTED,
SAMUEL DICKSON.

ARGUMENT IN BEHALF OF PLAINTIFF IN ERROR.

The decision of the Supreme Court of Pennsylvania in the Gloucester Ferry case is inconsistent with later as well as earlier decisions of the same court, and the reasoning of the learned judge who delivered the opinion is based upon a manifest error as to the character of the tax in controversy.

For many years, the State of Pennsylvania has, by successive statutes, required all corporations, foreign or domestic, doing business within her borders, to pay an annual tax upon their capital stock.

In this case, the Auditor General assumed that, because the ferry boats, while plying to and fro between Camden and Philadelphia, were half of the time on the Pennsylvania side of the center of the Delaware river, one half of its business was done in Pennsylvania, and that the company was liable to one half tax. He treated the tax as if it were imposed upon the business of the company. It is so considered in the opinion delivered by Mr. Justice Gordon. Said he:

"In this case, a single question is presented for our consideration. Did the defendant do business in Pennsylvania during the period for which the tax in controversy was imposed? If it did, then it came within the acts of May 1, 1868, and June 7, 1879, and was subject to the tax therein prescribed."

And again:

"Returning, then, to the only question in this case, the in-

quiry is, did this ferry company do business in Pennsylvania?"

He answers this inquiry in the affirmative, and sustains the tax because:

"Its main business, namely, its receipt of freight and passengers, was transacted, and for that business it was just as much dependent upon the one place as the other. * * * It thus appears that the defendant was dependent equally, not only for its business, but its power to do that business upon both States, and might therefore be taxed by both."

Mr. Justice Green dissented, declaring that:

"In the present case, the proposed tax is levied upon a form of property—capital stock. It is not a tax upon persons, natural or artificial. It is not, specifically, a tax upon business."

And one year later, Mr. Justice Paxson, in delivering the opinion of a majority of the same court, in *Commonwealth of Penna.* vs. *The Standard Oil Co. of Ohio*, 101 Penna., 119, a case arising upon the same acts of assembly, said:

"It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets."*

The case of the Standard Oil Company involved the largest sum of money ever directly involved in one tax suit in Pennsylvania, and was pressed with all the power of the Commonwealth. As it was a question of life or death with the company, it was opposed with equal earnestness. The court allowed unusual time and scope to its discussion by counsel, and the opinion filed is evidence of careful judicial consideration of all the points involved.

It was shown to the court that the tax was imposed

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*See the opinion printed in full, beginning on page 12 of this book.

by the acts of assembly upon capital stock at a valuation, dividends being made the measure of the value of the stock, and there were cited innumerable decisions that such a tax was a tax upon the property in which the capital stock was invested.

The position of the Commonwealth in that suit will best appear from the language of the Attorney General, who submitted a brief, in which he said:

> "Our first contention is that this tax may be fairly construed to be laid by the act of assembly on the corporation itself, and not on its tangible property, and is in the nature of compensation exacted for the privilege of investing capital and doing business in this State."

He argued that, as the statutes made no provision for apportioning the tax, the price of the privilege was measured by the whole of the company's capital stock, without reference to the location of its property. His main reliance was the decision in the Gloucester Ferry case, from which he quoted at length, and concluded by saying: "We ask nothing more than that the court shall adhere to this decision made less than a year ago."

Nevertheless, the Court, as already shown, ruled that the tax was a property tax, and although the Standard Oil Company was undeniably doing business in Pennsylvania and had some investments there, the tax was limited to that proportion of its capital stock representing property actually located within the State, and all beyond that was declared exempt from her taxing power. As the doctrine of this case is diametrically opposed to that of the Gloucester Ferry case, it must be considered as squarely overruling it. But it is in complete harmony with the decisions of this Court in

Bank of Commerce vs. *New York City*, *2 Black*, *620*, and *Bank Tax Case*, *2 Wallace*, *200*, wherein it was held that a tax upon the capital stock of a bank was a tax upon its property, and could not be enforced where that property consisted of stocks of the United States.

In 1884, the Commonwealth of Pennsylvania claimed taxes upon the entire capital stock of the Pennsylvania Coal Company and the National Transit Company, both domestic corporations whose operations extended into other States where part of their works were located, and one of them also owning United States bonds. November 6, 1884, there was filed in the Supreme Court of the State an opinion not yet reported, but which in its entirety reads as follows:

"*Per Curiam:* These cases were argued together. It was correctly held by the learned judges in the Court below that so much of the tangible property of the corporations as was situate in other States, and there employed in their corporate business, was not taxable here. *Commonwealth* vs. *Standard Oil Company*, *12 W. N. C.*, *293*.

As a tax upon capital stock is a tax on the property and assets represented thereby, it follows that so much of their capital stock as is represented by investment in United States bonds is not taxable by the Commonwealth, inasmuch as the bonds themselves cannot be taxed thereby. *National Bank* vs. *Commonwealth*, *9 Wall.*, *353*. Judgment affirmed in each case."

In the light of these decisions, it is plain that a tax upon one half of the capital stock of the Gloucester Ferry Company is a tax upon one half of its boats and other property. This corporation was created by the State of New Jersey. Its domicile is there and there only. All of its property is within that State, and the home port of all of its boats is Camden, in said State, where they are all duly registered.

The State of Pennsylvania has no jurisdiction over this company or its property.

In McCullough *vs.* Maryland, 4 Wheaton, 429, Chief Justice Marshall announced the proposition as self-evident "that all subjects over which the sovereign power of a State extends are the object of taxation, but *those over which it does not extend are, upon the soundest principles, exempt from taxation.*" In many cases, and in varying language, this proposition has been repeated by the courts.

In State Tax on Foreign Bonds, 15 Wallace, 319, it is said:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business."

In Hays *vs.* Pacific Mail Steamship Company, 17 Howard, 596, it was held that the State of California had no jurisdiction, for the purpose of taxation, over vessels not abiding within its limits, so as to become incorporated with the other personal property of the State.

In Morgan *vs.* Parham, 16 Wallace, 471, it is said:

"It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purposes of taxation, for the reason that it had not become incorporated into the personal property of the State, but was there temporarily only, and was engaged in lawful commerce between the States, with its *situs* at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value."

In St. Louis *vs.* The Ferry Company, 11 Wallace, 493, this Court, SWAYNE, J., said:

"Where there is jurisdiction neither as to person nor prop-

erty, the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits, and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In Delaware Tax Case, 18 Wallace, 229, this language is used:

"We proceed, therefore, to the second objection of the act, that it imposes taxes upon property beyond the jurisdiction of the State. If such be the fact, the tax to that extent is invalid, for the power of taxation of every State is necessarily confined to subjects within its jurisdiction."

The same principle is held in the Railroad Company *vs.* Jackson, 7 Wallace, 262. Although this case is criticised in State Tax on Foreign Bonds, 15 Wallace, 319, it is there said:

"The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition."

In Hoyt *vs.* Sprague, 103 U. S., 630, the general principle is stated that "no State or nation can, by its laws, directly affect or bind property out of its own territory."

The principle is also recognized in the Constitution of the State of Pennsylvania, in the provision that "all taxes shall be uniform upon the same class of subjects *within the territorial limits of the authority levying the tax.*" The words italicised are meant to in-

dicate the limit of authority to tax, whether by the State or a municipality.

Over and over again Federal and State courts have held that any attempt by legislative enactment to tax persons or property beyond the territorial limits of the taxing power is void. But what law makes it void? To what principle do the Federal courts appeal to declare it void? We answer, to the principle laid down in McCullough *vs.* Maryland, 4 Wheat., 316, that it is *a necessary implication of the Federal Constitution* that the power of taxation residing in the State shall be measured by the extent of sovereignty which the people of a single State possess and can confer on its government.

"In this," says Chief Justice Marshall, "we have an intelligible standard applicable to every case to which the power may be applied: we have a principle which is safe for the States and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty, from interfering powers, from a repugnancy between a right in one Government to pull down what there is an acknowledged right in another to build up, from incompatibility of a right in one Government to destroy what there is a right in another to preserve."

And the learned justice contends that the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one Government the power to control the constitutional measures of another. He shows how the whole principle of our Government would be disastrously altered if such taxation were allowed. He applies the principle to the matter of taxation by a State, of property of the United States, but the principle applied is

that of taxation by a State of property over which it has no jurisdiction.

The object of the Federal Government was, and is, to "insure domestic tranquility" and "establish justice." If it has not the power to prevent one State from deriving its revenues from property belonging to the sovereignty and within the protection of another State, it is poorly adapted to fulfill the intention of its founders.

It is said in Lane Co. *vs.* Oregon, 7 Wallace, 76, that "in many of the articles of the Constitution, the necessary existence of the States, and *within their proper spheres* the independent authority of the States, is distinctly recognized." The *proper spheres* of the States are as distinctly recognized as their necessary existence, and that each State shall keep within its proper sphere is "a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds." McCullough *vs.* Maryland, *supra.*

The dissenting opinion of Mr. Justice Green, and the printed arguments of Mr. Johnson and Mr. Henry, conclusively show that this tax, if held to be a direct tax upon the corporation or upon its business, is a regulation of commerce, and, as such, forbidden by the Federal Constitution. As a tax upon the property of the corporation, it is equally so. Boats, railroad cars, and other vehicles of inter-State transporta-

tion may undoubtedly be taxed as property at the domicile of the owner. But this is an attempt to tax them as property in another State, where they have no *situs*, but simply touch in receiving or discharging inter-State freight and passengers. This case is clearly within the reasoning of *Pullman Southern Car Co.* vs. *Nolan*, 22 *Federal Reporter*, 276, wherein Mr. Justice Matthews says:

"In the present case, the Pullman Southern Car Company has no domicile in Tennessee, and is not personally subject to its jurisdiction for purposes of taxation, and the sleeping-cars which it runs and uses upon the sleeping-cars of that State in the transportation of passengers into and from it, from and to other States, have no *situs* within that State for the purposes of taxation. They are not brought into the State for the purpose of being employed in a business carried on within it, and do not become a part of the mass of property within the jurisdiction of the State for purposes of taxation. They are in the State only as passing to and from it in the act of transportation performed by virtue of a right secured to the owners of them, not by the authority of the laws of Tennessee, but by virtue of a right secured by the exclusive jurisdiction of Congress under the Constitution."

This case is identical in principle with *State of Indiana* vs. *Pullman Palace Car Company*, *16 Federal Reporter*, *193*, in which Gresham, J., says:

"The tax claimed by Indiana, under section eighty-seven of the State act, is not a license for establishing and maintaining an agency or local place of business in the State, or a tax upon property having a *situs* in the State, but, as already seen, it is a tax upon money in the defendant's treasury in Illinois because it was earned in transporting passengers across Indiana. This is an effort to give a statute of Indiana extra territorial force, and to regulate commerce between the States, for both of which reasons section eighty-seven is inoperative and void."

In *Morgan* vs. *Parham*, *16 Wallace*, *471*, the facts

OPINION OF SUPREME COURT OF PENNSYLVANIA

IN

COMMONWEATH OF PENNSYLVANIA *vs.* STANDARD OIL COMPANY OF OHIO, DELIVERED BY PAXSON, J., NOVEMBER 22, 1882.—*101 Penna. Reports, 119.*

Each party to this controversy is dissatisfied with the judgment of the court below, and has taken its writ of error. We will first consider the case as presented upon the Commonwealth's writ.

The principal contention was to the extent the Standard Oil Company is liable to taxation under the several acts of assembly taxing foreign corporations "doing business within this Commonwealth." The court below found the fact that the company was doing business here; indeed, it is not seriously denied that it has rendered itself liable to taxation. It was contended on the part of the Commonwealth that, according to the letter of the statutes, the tax should be imposed upon all of the capital stock of the company, while, on the other side, it was urged that only so much of the stock was intended to be taxed as is represented by property of the company invested and used in the State of Pennsylvania.

It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets. *Saving Fund* vs. *Yard, 9 Barr, 359; Lehigh Coal and Navigation Company* vs. *Northampton county, 8 W. and S., 334; West Chester Gas Company* vs. *County of Chester, 6 Casey, 232; Lackawanna Iron and Coal Co.* vs. *County of Luzerne, 6 Wright, 424; New York and Erie R. R. Co.* vs. *Sabin, 2 Casey, 242; Erie R. R. Co.* vs. *Com., 16 P. F. S., 84; County of Lackawanna* vs. *The Bank, 13 Norris, 221; Coatesville Gas Co.* vs. *Chester county, 1 Outerbridge, 476; Phœnix Iron Co.* vs. *The Com.*,

9 P. F. S., 104; Mutual Insurance Co. vs. *Supervisors of Erie, 4 N. Y., 442; International Life Insurance Society* vs. *Commissioners, 28 Barb., 318; New Haven* vs. *Bank of New Haven, 31 Conn., 106; Nichols* vs. *New Haven Co. 42 Id., 103; Mechanics' Bank* vs. *Bridges, 30 N. J., 112; State* vs. *Haight, 30 Id., 319; State Bank* vs. *Brackenridge, 7 Blackf., 395; Auditor* vs. *New Albany R. R. Co., 11 Ind., 570; Whitney* vs. *Madison, 23 Id., 331; State* vs. *Hamilton, 5 Id., 310; Michigan R. R. Co.* vs. *Porter, 17 Id., 380; Quincy R. R. Bridge Co.* vs. *Adams, 88 Ill., 65; Hannibal and St Joseph R. R. Co.* vs. *Shacklett, 30 Mo., 558; Rome Railroad* vs. *Rome, 14 Ga., 275; National Bank* vs. *Com., 9 Wallace, 353; Illinois R. R. Tax Cases, 2 Otto, 598; Bibb Co* vs. *Central R. R. Co., 40 Ga., 646; Gordon* vs. *Mayor, 5 Gill, 231.* Equally well settled is the principle that the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. See *State Tax on Foreign-held Bonds, 15 Wallace, 319; Maltby* vs. *Reading and Columbia R. R. Co., 2 P. F. S., 146; McCullough* vs. *State of Maryland, 4 Wheaton, 316.*

It is, undoubtedly, competent for the Legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within this State. The act of 1868, (P. L. 83,) to revise, amend, and consolidate the several laws regulating the licensing of foreign insurance companies is such an act. It required a license and imposed a tax. Heavy fines were inflicted upon any such company doing business without a license, and it was made a misdemeanor for any person to act as agent or transact business for an unlicensed company. A license tax is evidently intended as a compensation to the State for the protection which it affords foreign corporations who have an office within its borders for the convenience of its officers, but upon whose property it could impose no tax because not within its jurisdiction. The tax in this case is in no sense a license tax. The State never granted a license to the Standard Oil Company to do business here. It merely taxes its property; that is, its capital stock, to the extent that it brings such property within its borders in the transaction of its business. It was contended, on behalf of the Common-

wealth, and pressed with much learning and ability, that when a foreign corporation enters the State to do business, it brings its entire capital stock with it. This position is ingeneous, but unsound. It is a fundamental principle that the person must have a domicile in the State in order to be taxed, and the thing must have a *situs* therein. *Hays* vs. *Pacific Mail Company*, *17 Howard*, *596*; *Morgan* vs. *Parham*, *16 Wallace*, *471*; *St. Louis* vs. *The Ferry Company*, *11 Wallace*, *423*. Persons and property *in transitu* cannot be taxed. *Hoyt* vs. *Commissioners of Taxes*, *23 N. Y.*, *224*. The domicile of a corporation is the state of its origin, (*Potter on Corporations*, *section 10*,) and it cannot migrate to another sovereignty. *Bank of Augusta* vs. *Earle*, *13 Peters*, *586*; *Paul* vs. *Virginia*, *8 Wallace*, *168*; *St. Louis* vs. *The Ferry Company*, *11 Wallace*, *423*. The domicile of the Standard Oil Company is in the State of Ohio. Being a corporation, it is an invisible, artificial, and intangible thing. When it sent its agents to this State to transact business, it no more entered the State, in point of fact, than any other foreign corporation, firm, or individual who sends an agent here to open an office or branch-house. Nor does it bring its capital here constructively. A corporation must be considered as a person, an artificial one it is true, and it would be as reasonable to assume that a business firm in Ohio brought its entire capital here, because it sent its agent here to establish a branch of its business, as to hold that the Standard Oil Company, by employing certain persons in this State to transact a portion of its business, thereby brought all its property or capital stock within our jurisdiction. There is neither reason nor authority for such a proposition.

To the extent that it brought its property here it is taxable, and no further. An act of Assembly must have a reasonable construction. When it says "all" horses, "all" carriages, shall be taxed, it does not mean all horses and all carriages in the State of Ohio. It refers to all such things as are within the jurisdiction of the taxing power. Regarding the words "capital stock" in the act of Assembly as the equivalent of the property and assets of the corporation, we must construe them to mean so much of the capital stock measured by the property actually brought within the State by the company in the transaction of its business. This construction is in entire

accord with the practice heretofore existing in the Auditor General's office and the repeated decisions of the courts. It has been distinctly recognized and affirmed in the *Com.* vs. *The Trenton Bridge Co., 9 Am. L. Reg. O. S., 298; Com.* vs. *Pittsburgh & Connellsville Railroad Co., 2 Pearson, 389.* In *Pittsburgh, Ft. Wayne & Chicago Railway Co.*, vs. *The Com., 16 P. F. S., 73*, it was said: "It cannot be pretended that a State can by law impose a tax upon that which is entirely beyond its jurisdiction, or on property to which its laws afford no protection. The custom to assess *pro rata* has received the sanction of the court in several cases when applied to the stock of corporations." To the same effect are *Com.* vs. *C. P. & A. R. R. Co., 5 Casey, 370; Buffalo & Erie R. R. Co.* vs. *Com., 3 Brewster, 374; Com.* vs. *Erie R. R. Co., 11 W. N. C., 89*, and *Petroleum Co.* vs. *The Com., 25 Legal Inte., 316. The Com.* vs. *Gloucester Ferry Company, 10 W. N. C., 509*, is not in conflict with this view. That case came up upon a case stated, and the amount of the tax was therein fixed, provided the company should be held liable at all. My impression is, the tax was upon half the capital stock, the company being a New Jersey corporation engaged in carrying passengers and freight between Philadelphia and Gloucester, N. J., and having an office and wharf at each place. There was nothing in the case to militate against the apportionment of taxes. In the Erie Railway case, decided at the same term, it was said by our brother Trunkey: "It is conceded that the act of 1874 does not impose a tax upon the entire stock of the Erie Railway Company; only upon a fair proportion, with reference to so much of the road as is located in Pennsylvania." *11 W. N. C., 89.*

Speaking for myself, I doubt the power of the Legislature to tax the entire property and assets, *i. e.*, the entire capital stock of a foreign corporation whose necessities compel it to transact a portion of its business, however small, within this State. I concede the power of the Commonwealth to exclude foreign corporations altogether from her borders, or she may impose a license tax so heavy as practically to amount to the same thing. But great and searching as her taxing power is, I deny that it can tax either persons or property not within its jurisdiction. A foreign corporation has no domicile here

and can have none; hence, it cannot be said to draw to itself the constructive possession of its property located elsewhere. There are a large number of foreign insurance companies doing business here under license from the State. Some of them have a very large capital. It is usually invested at the domicile of the company. If the position of the Commonwealth is correct, she can tax the entire property of the Royal Insurance Company, although the same is located almost wholly in England, or the assets of the New York Mutual, located in New York. Whether I am correct in this view or not, it is very certain that a sense of its injustice, or perhaps that courtesy which springs from the comity between the States, has prevented the Legislature heretofore from asserting a power of so doubtful a character. We will not impute such a purpose to it now, in the absence of any such clearly expressed intent. It would be the more improper to do so in view of the fact that when the acts of 1868, 1874, 1877, and 1879 were passed, the Legislature were perfectly aware of the construction given to similar acts by the Auditor General and by the courts. That they made no change in those acts in this respect is persuasive evidence that they were satisfied with the law as thus construed, and intended to continue it.

We see no error in the conclusion of law which the learned judge arrived at upon his fourth finding of facts. That the purchase of oil in this State by a foreign corporation, for the purpose of shipping to its refineries without the State, is doing business within this State, is a proposition that does not need serious discussion. It is true the charter of the Standard Oil Company authorizes it to deal in oil, but the finding of fact does not include such dealing. On the contrary, the court finds that the petroleum was shipped to and refined at the company's refineries beyond the limits of the State. Thousands of corporations and individuals in other States make their purchases of supplies of raw material here, but it has never been seriously asserted that they were doing business within this State. It has not been the policy of the State at any time, as evidenced by its tax law, to embarrass the development and sale of her rich products, mineral and agricultural, by levying tolls upon strangers who come here to buy; and it is not the province of the courts to erect a judicial Chinese

wall around the State, which could not fail to affect injuriously the best interests of the people.

Nor do we think the company liable to taxation here upon its shares of stock in Pennsylvania corporations, including limited partnerships. These corporations have already contributed their proportion of the State's burdens. That the capital stock of a corporation is a different thing from shares of stock appears from *Lycoming County* vs. *Gamble*, *11 Wright, 110.* The capital stock represents the property and assets of the company, which may consist in whole or in part of real estate. The certificates or shares of stock are the evidence of an interest which the holder has in the corporation, and it is well settled that this interest is personal property. *Bouvier's Law Dict., 4 Davis, Ab. 670;* and, as such, follow the person of the owner. *McKeen* vs. *County of Northampton, 13 Wright, 519.* It was held in the case last cited that shares of stock were taxable at the domicile of the owner, although the shares were the stock of a corporation of another State. It follows, necessarily, that shares of stock in a Pennsylvania corporation, held by a corporation or individual domiciled in another State, cannot be taxed here. One sufficient reason is that there is nothing here to tax. The capital stock, that is, the property and assets, are here, and are taxed. But the shares or certificates of stock are not here. They are actually and constructively at the domicile of the owner, at which place they are subject to taxation by the taxing power of the place. The Standard Oil Company, as before observed, is domiciled in the State of Ohio. It has never been here, for it cannot migrate. It is recognized in this and other States, and has its agents here, who attend to its affairs.

We are of opinion that the Commonwealth has no occasion to complain of the rulings of the court below, and upon its writ of error the judgment must be affirmed.

It remains to consider the case, as presented upon the writ of error taken out by the Standard Oil Company.

The only important error assigned is that "the court erred in finding as a conclusion of law that defendant is liable for

interest at twelve per centum per annum, and penalty of ten per centum of the amount of tax due."

The third section of the act of May 1, 1868, P. L. 108, provided that if the officers of corporations taxed under said act should neglect or refuse to furnish the report required by the second section of said act on or before the 31st day of December, a penalty of ten per centum shall be added to and collected with the tax. The Commonwealth claimed, and the court below allowed, this penalty. The difficulty in the way of the Commonwealth is that the third section of the act of 1868, giving the penalty, was repealed before the suit was commenced below, or any claim made for either the tax or penalty. The eleventh section of the act of April 24, 1874, (P. L. 68,) provided "that all laws or parts of laws inconsistent herewith, and the first, second, third, fourth, seventh, eighth, and ninth sections of an act entitled 'An act to revise, amend, and consolidate the several laws taxing corporations, brokers, and bankers,' approved the 1st day of May, 1868, and the fourth section of an act entitled 'An act relating to the revenues of the Commonwealth,' approved the 21st day of March, 1873, be and the same is hereby repealed, saving, reserving, and excepting unto the Commonwealth the right to collect any taxes accrued or accruing under any of said sections or acts prior to the repeal of the same. In like manner, the third section of the act of April 24, 1874, imposing a similar penalty, was repealed with others by the eighth section of the act of March 20, 1877, (P. L., 6,) and the second section of the act of 1877, imposing a like penalty, was repealed by the eighteenth section of June 7, 1879, P. L. 112. Each of the last-named repealing acts contained a similar reservation to the one in the act of 1874, as to the right of the Commonwealth to collect all taxes accrued or accruing prior to the repeal.

The law upon this state of facts is well settled. The Commonwealth reserved the right to collect this tax only. The right to the penalties was gone. No judgment can be rendered in any suit for a penalty after the repeal of the act by which it was imposed. The repeal of a statute puts an end to all suits founded upon it, even though commenced before the date of the repeal. *Rex* vs. *Justices of London*, *3 Burr., 456; Schooner Rachel* vs. *United States*, *6 Cranch, 329; The Irre-*

sistible, 7 Wheaton, 551; United States vs. *Preston, 3 Peters, 57; Pope* vs. *Lewis, 4 Alabama, 489; Lewis* vs. *Foster, 1 New Hampshire, 61.* The repeal of an act imposing a penalty is itself a remission. *Maryland* vs. *Balt. and O. R. R. Co., 3 Howard, 534; Norris* vs. *Crocker, 13 Id., 429.* In reserving, in the repealing acts, all taxes accrued and accruing the Commonwealth reserved the right to employ all the ordinary remedies for their collection. But the penalties are in no sense such remedy. They are merely a punishment for the omission to make the reports required by law. The State might have also excepted the penalties from the operation of the repealing acts, but did not do so. Penal statutes must be construed strictly and never extended by implication. *Andrews* vs. *United States, 2 Story, 203.* When there is such an ambiguity in a penal statute as to leave reasonable doubt of its meaning, it is the duty of a court not to inflict the penalty. *The Schooner Enterprise, 1 Paine C. Ct., 32.*

The charge of interest at twelve per cent. is also a penalty, and is governed by the same rules. *Easton Bank* vs. *The Commonwealth, 10 Barr, 451* would seem to be conclusive upon this branch of the case.

The act of March 20, 1877, contains no provision for the addition of any interest to the taxes imposed. The thirteenth section of the act of June 7, 1879, imposed interest at twelve per cent. for non-payment of the tax, but there is a strong implication from the proviso of the act that the corporation shall be in default after "the Auditor General shall first have sent to such corporation a statement of amount due."

We are of opinion that the Commonwealth can only claim interest from the time of notice and demand by the Auditor General.

The judgment is reversed upon the Standand Oil Company's writ of error and a *procedendo* awarded.

114-96

Supreme Court of the United States.

No. 185. October Term, 1884.

The Glouster Ferry Company,

Plaintiff in Error.

vs.

The Commonwealth of Pennsylvania,

Defendant in Error.

In Error to the Supreme Court of Pennsylvania.

Brief of Argument of Commonwealth of Pennsylvania.

ROBERT SNODGRASS,
Deputy Attorney General.

LEWIS C. CASSIDY,
Attorney General.

BRIEF OF ARGUMENT FOR THE COMMONWEALTH OF PENNSYLVANIA.

This case came originally into the State courts on an appeal from a settlement by the Auditor General and State Treasurer, under the act of March 30, 1811, for tax upon capital stock. Subsequently, it took the form of a case-stated, and as such it was heard and decided by the Supreme Court of Pennsylvania, and is now here for review upon a writ of error to that judgment.

The period covered by the settlement was from 1865 to 1879, inclusive, and involved the consideration and construction of certain provisions of *four* acts of Assembly, namely:

Act of May 1, 1868, section 4, (P. L. 1868, p. 109.)
Act of April 24, 1874, section 5, (P. L. 1874, p. 70.)
Act of March 20, 1877, section 3, (P. L. 1877, p. 6.)
Act of June 7, 1879, section 4, (P. L. 1879, p. 112.)

It will be observed that no reference is made to either of these statutes in the case-stated, nor is there anything in the record, or the judgment as finally rendered, to show to what provision of the Constitution of the United States they are alleged to be repugnant.

It would, probably, have been more satisfactory if the Federal questions sought to be thus raised had been more definitely presented, yet we do not desire to take advantage of any technical objections on that ground, and if the Court shall be of the opinion that the questions argued are sufficiently raised to give jurisdiction, we shall be content.

Assuming, however, that if a "Federal question was necesvolved in the decision," the Court will take jurisdiction under the authority of *Murray* vs. *Charleston*, *96 U. S.*, *432*, we will proceed, at once, to consider the issues raised by the argument, without further reference to the pleadings.

In presenting the case from our standpoint, we do not deem it necessary to follow the learned counsel through the elaborate argument and citations of authority which they have submitted. The four propositions stated may, without strain, be formulated into one, namely, that the State of Pennsylvania cannot tax a foreign corporation—that is, a corporation of another State—in respect to its capital stock, if such corporation is engaged in inter-State commerce.

Abstractly stated, this proposition would seem to include all corporations whose business, in any way, relates to inter-State transportation. And yet this cannot be true, because the right of the State to impose a tax upon the capital stock of foreign railroad, canal, express, and other corporations so engaged, graduated by the extent to which their franchises are exercised within the State, cannot at this day be successfully controverted. If it could, we must overturn the authority of *Minot* vs. *Phila., Wilmington and Baltimore R. R. Co., 18 Wall, 206*, and numerous other cases since decided in both Federal and State courts. So far at least, therefore, as Pennsylvania is concerned, the proposition of the learned counsel is not of universal application.

The corporation with which we have to deal in this case is a ferry company, and it is, therefore, pertinent to inquire what we understand by such a company.

In the *Terms of the Law, 338*, a ferry is said to be "a liberty by prescription, or the king's grant, to have a boat for a passage upon a great stream, for carrying of horses and men for reasonable toll."

In *Charles River Bridge* vs. *Warren Bridge, 11 Peters, p. 620*, Justice Story said: "It is a franchise which approaches so near to that of a bridge, that human ingenuity has not been able to state any assignable difference between them, except that one includes the right of pontage, and the other of passage or ferriage."

"A public ferry," said he, "is a public highway of a special description, and its termini must be in places where the public have rights, as towns, or vills, or highways leading to towns or vills," (p. 622.)

These definitions will serve to indicate the nature of a ferry franchise as understood and declared by the older authorities,

and will also aid materially in solving the question whether the business of ferriage, over a navigable river, is "commerce" in the Constitutional sense, as seems to be assumed by the learned counsel.

Of course, there can be no controversy here as to the fact of transportation. All ferriage, of necessity, involves transportation, and may include navigation as well, but neither transportation nor navigation is necessarily of itself "commerce." Hence, we submit that it does not follow, because ferriage is carried on over a navigable river, involving transportation as well as navigation, that the framers of the Federal Constitution meant to include such business or service within the general term "commerce."

Justice Green, in his dissenting opinion, cited by counsel, after referring to and quoting the definitions of the term "commerce," as given by Chief Justice Marshall in, 9th and 12th Wheaton, says:

"These judicial definitions are sufficiently precise to estab-
"lish that the word 'commerce,' as used in the Federal Consti-
"tution, imports and includes intercourse and traffic between
"the States of the Union over navigable waters, as well as be-
"tween the States and foreign countries."

This summary of the "definitions" is undoubtedly correct, but it does not follow that the business, as ordinarily carried on by ferry companies, is such "intercourse and traffic" as are here referred to. Chief Justice Chase said, in *Osborne* vs. *Mobile*, *16 Wallace*, *479*, that inter-State commerce was designed by the Constitution to be *entirely free*, and especially so when carried on upon the high seas or navigable rivers, which "are the recognized highways of trade and intercourse," for the use of which the navigator requires no franchise.

Railroad Co. vs. *Maryland*, *21 Wall*, *470*.

The criterion of the business, therefore, which is called "commerce," in the Constitutional sense, and to which the learned judge had manifest reference, is that it shall be absolutely free from State or local control, and only subject to the regulations of the National Legislature, under the Federal Constitution.

But can such freedom be predicated of a ferry company? Is any person or corporation at liberty to establish a ferry on a navigable river, separating two States, without regard to State authority? Or, putting it the other way, has a State the right to grant ferry franchises on such rivers, and impose conditions for their exercise? If so, the business of ferriage is not "commerce," within the meaning of the Federal Constitution, in the sense that it must be free from State or local authority and control.

In saying this, we are not to be understood as asserting that a ferry may not be, or in this case, is not an *instrument of commerce.* It is as much so, and perhaps, in the same sense as a bridge, but in any case it is, at most, no more than a local aid or instrument, which Congress has never undertaken to regulate or control.

The distinction which we are here seeking to draw was forcibly recognized by Mr. Justice Field, in *County of Mobile* vs. *Kimball, 102, U. S., 702,* when he said:

"Perhaps some of the divergence of views upon this question "among former judges may have arisen from not always bear- "ing in mind the distinction between commerce, as strictly de- "fined, and *its local* aids or instruments, or measures taken for "its improvement. Commerce with foreign countries and "among the States, strictly considered, consists in intercourse "and traffic, including in these terms navigation and the trans- "portation and transit of persons and property, as well as the "purchase, sale, and exchange of commodities. For the reg- "ulation of commerce, as thus defined, there can be only one "system of rules applicable alike to the whole country; and "the authority which can act for the whole country can alone "adopt such a system. Action upon it by separate States is "not, therefore, permissible. Language affirming the exclu- "siveness of the grant of power over commerce, as thus defined, "may not be inaccurate, *when it would be so if applied to* "*legislation upon subjects which are merely auxiliary to com-* "*merce.*"

That the power to establish and regulate ferries, as well as other local aids to commerce, rests in the State Legislatures, and not in Congress, is well settled.

In the case of *Conway et al.* vs. *Taylor's Executor, 1 Black,*

603, cited by counsel, it was distinctly held "that the authority to establish and *regulate* ferries is not included in the power of the Federal Government to 'regulate commerce with foreign nations and among the several States, and with the Indian tribes.'"

In *The People* vs. *Babcock*, *11 Wendell*, *586*, Judge Nelson said:

"That the State has the power to establish and regulate ferries is indisputable, unless it has been conferred on the National Government by some clause in the Constitution; that it has been so conferred has not been claimed by that Government, and, on the contrary, it has been expressly disclaimed by the Judicial Department thereof."

Speaking of inspection laws, Chief Justice Marshall said, in *Gibbons* vs. *Ogden*, *9 Wheaton*, *1*, that "they form a portion "of that immense mass of legislation which embraces every-"thing within the territory of a State; not surrendered to the "general Government, all which can be most advantageously "exercised by the States themselves. Inspection laws, quar-"antine laws, health laws of every description, as well as laws "for regulating the internal commerce of a State, and those "which respect turnpike roads, *ferries*, &c., are competent "parts of this mass." See also

State v. *Freeholders of Hudson Co.*, *3 Zabris.*, *206.*
Fanning v. *Gregorie*, *16 Howard*, *524.*
Wriggins Ferry Co. v. *East St. Louis*, *107 U. S.*, *365.*

In the light of these authorities, we submit, therefore, that ferries not being within the exclusive jurisdiction of Congress, but subject to the regulation and control of the States, a tax upon such companies which, *eo nomine*, is not laid upon the vessels themselves, or graduated according to their tonnage, is not an infraction of the Federal Constitution. This we say without regard to whether the State of Pennsylvania has exercised its power in this respect or not, since the whole argument of the learned counsel is based upon the assumption that there is no distinction between the business of a ferry company and that of any corporation engaged in inter-State traffic upon the high seas or navigable rivers.

And this brings us to notice somewhat more particularly the distinction which, we have endeavored to show, does, in fact, exist between ferriage and commerce in the Constitutional sense.

Ferries are established by the legislative authority of the several States. Without such authority, no one, although he may own both banks of a navigable river, has the right to establish a ferry.

Charles River Bridge v. *Warren Bridge*, *11 Pet.*, *421.*
Stark v. *Miller*, *3 Mo.*, *470.*
Trustees, &c., v. *Tatman*, *13 Ills.*, *27.*

Ferry boats are restricted to ply between given points, and by a prescribed course. They pass and repass between their landing places without clearances under the navigation statutes. Although they are held to be common carriers in some senses, they are limited in their rates of toll, for the transportation of persons and property, by the terms of the grant under which they exist. Whilst liable for loss or injury resulting from negligence, the property in process of transportation is always, either directly or indirectly, in the custody of others.

Mr. Justice Story said in *Charles River Bridge* vs. *Warren Bridge*, *supra*, that "a grant of a ferry must always be by "local limits; it must have some termini, and must be between "some fixed points, vills, or places."

In all these respects, the business of ferriage differs from that of ordinary commerce, and it seems to have been precisely this difference which was in the mind of Justice Gordon when, in deciding this case, he said:

"Returning, then, to the only question in this case, the in-"quiry is, did this ferry company do business in the State "of Pennsylvania? But this question may be readily solved "by the answer which must necessarily be given to another "question, that is: Where were its principal, or for that "matter, only, points of operation? The answer is, at Glou-"cester and Philadelphia. Its whole income was derived from "the transportation of freight from its wharf at Gloucester "to its wharf at Philadelphia and from its wharf in Philadel-"phia to its wharf in Gloucester. At each of these points, it

" had a place, that is, a wharf, where its main business, viz: " its receipt of freight and passengers, was transacted, and for " that business it was just as much dependent upon the one " place as upon the other. Again, a wharf or landing-place " was necessary at each end of its route; the one it occupied " at Gloucester was owned in fee, and the one in Philadelphia " it held under a lease; but as it could hold by purchase in " New Jersey only by virtue of the power derived from the " statutory will of the Legislature of that State, so it could " hold by lease in Philadelphia only by the implied consent of " the Legislature of this Commonwealth.

" *It thus appears that the defendant was dependent equally,* " *not only for its business, but its power to do that business,* " *upon both States, and might, therefore, be taxed by both.*"

The test of taxability applied by Justice Gordon was the " doing of business " within the State, and if we are correct that the business of ferriage is not, *per se*, commerce, but only an aid to commerce, and that the control of such business rests with the States and not with Congress, then his conclusion that this corporation was taxable is unquestionably sound.

Let us next look at the nature of the tax in question, in order to see whether it is within the power of the State to impose it. The language of the several taxing statutes of Pennsylvania, from time to time passed, and under several of which this tax is claimed, is practically the same in all. A reference to one will suffice for all. The fourth section of the act of June 7, 1879, (P. L. 112,) is as follows:

" SECTION 4. That every company or association whatever, " now or hereafter incorporated by or under any law of this " Commonwealth, or now or hereafter incorporated by any " other State or Territory of the United States or foreign gov- " ernment, and doing business in this Commonwealth, or hav- " ing capital employed in this Commonwealth in the name of " any other company or corporation, association or associa- " tions, person or persons, or in any other manner, except for- " eign insurance companies, banks and savings institutions, " shall be subject to and pay into the treasury of the Com- " monwealth annually a tax to be computed as follows, namely: " If the dividend or dividends made or declared by such com-

"pany or association as aforesaid, during any year ending with
"the first Monday of November, amount to six or more than
"six per centum upon the par value of its capital stock, then
"the tax to be at the rate of one half mill upon the capital
"stock for each one per centum of dividend so made or de-
"clared; if no dividend be made or declared, or if the divi-
"dend or dividends made or declared do not amount to six
"per centum upon the par value of said capital stock, then the
"tax to be at the rate of three mills upon each dollar of a val-
"uation of the said capital stock made in accordance with the
"provisions of the second section of this act; and in case any
"such company or association shall have more than one kind
"of capital stock, as for instance common and preferred stock,
"and upon one of said stocks a dividend or dividends amount-
"ing to six or more than six per centum upon the par value
"thereof has been made or declared, and upon the other no
"dividend has been made or declared, or the dividend or divi-
"dends made or declared thereon amount to less than six per
"centum upon the par value thereof, then the tax shall be at
"the rate of one half mill for each one per centum of dividend
"made or declared upon the capital stock, upon the par value
"of which the dividend or dividends made or declared amount
"to six or more than six per centum, and in addition thereto
"tax shall be charged at the rate of three mills upon each dol-
"lar of a valuation, made also in accordance with the provis-
"ions of the second section of this act, of the capital stock
"upon which no dividend was made or declared, or upon the
"par value of which the dividend or dividends made or de-
"clared did not amount to six per centum; and it shall be the
"duty of the treasurer or other officer having charge of any
"company or association upon which a tax is imposed by this
"section of this act, to transmit the amount of said tax to the
"treasury of the Commonwealth, within fifteen days from 31st
"day of December in each and every year: *Provided*, That
"whenever such corporation or company shall make any profit
"and add the same to its sinking fund, without a division
"thereof amongst its stockholders, the amount of the profit
"thus added to its sinking fund shall be included in the re-
"port required by the second section of this act to be made,
"and for the purpose of this act the same shall be treated as

"having been divided amongst the stockholders, and shall sub-"ject the capital stock to taxation as a dividend: *Provided*, "*however*, That said money or any part thereof shall be ex-"pressly set apart for the payment of debts."

This section, it will be seen, by its express terms, taxes the capital stock not merely of corporations of domestic creation, but of all those "incorporated by any other State * * * and doing business in this Commonwealth."

Now, it is very plain that one half of the bed of the river Delaware belongs to the Commonwealth of Pennsylvania, or, at least, is subject to her jurisdiction.

Mr. Justice Sharswood thus declared the law on that subject:

"The bed and channel of the Delaware river *ad medium aquæ filium* belong respectively to the States of New Jersey and Pennsylvania. The grants both to the proprietaries of the former and to William Penn were bounded on each side of the river. *Bennett* vs. *Boggs*, *Baldw.*, *72*. The bed and the channel remained in the British crown, but by the Revolution and the acknowledgment of the independence of the colonies by the treaty of peace, all the rights and sovereignty of the crown were transferred to and vested in the several States. The Delaware being a navigable co-terminus stream between New Jersey and Pennsylvania, the title of each to the bed extended from their respective shores to the middle of the river, according to the well-established principle of universal law. Vattal, § 266."

It follows, therefore, as a geographical fact, that as each ferriage of persons and property is made across the entire stream, this company is "doing business in this Commonwealth," and is manifestly within the class of corporations intended to be taxed by our laws. But it is not merely within the taxing intention; it is plainly within the taxing power of the State. It is a foreign corporation, not strictly engaged in inter-State commerce, as we have seen, and it is sufficient, therefore, to say that never, since the decision of *Augusta* vs. *Earle*, *13 Peter*, *519*, has it been denied that where a State can restrict or control the business of a corporation, when transacted within her limits, she can tax such business so far as it is done within her jurisdiction, or can exclude the corporation altogether if she so desires.

We do not deny that there is a wide distinction between transportation by water and transportation by land, but when it is sought, by that distinction, to explain the regulation and control of railroads by the States, we submit that the same distinction prevails between the business of ferriage and that of commerce, strictly defined, and that the same authority which regulates and controls the operations of railroads engaged in inter-State traffic, may also regulate and control the business of corporations exercising ferry franchises within her limits.

Under the taxing system of Pennsylvania, it has never been contended that the *situs* of the rolling-stock of a foreign railroad company is an element in determining its taxability. As the value of the rolling-stock of such a corporation is distributed along the whole line, in ascertaining the proportion of stock which is taxable by the State, so the value of the boats and other property of this corporation, including the franchise, must be distributed between the termini in determining not only the question of taxability, but also the amount of the tax.

The question of *situs* has, therefore, no place in the controversy. The inquiry is whether the corporation is employing its capital, or is doing business, or exercising its franchise, within the State, and if so, it becomes taxable, no matter where its domicile may be, or where its tangible property is located.

Furthermore, there can be no question as to the amount of the tax. That is settled beyond dispute by the case stated, and no error, if any there be, as to the extent to which the corporation is taxable, whether as to a moiety or any other fraction of its capital stock, can be the subject of review here.

We have thus endeavored to present this case in the light of the principles which we think control it. We have not desired to draw imaginary distinctions, but to point out substantial differences, which, we submit, distinguish this case from those relied on by the learned counsel for the plaintiff in error, both in the original and supplemental briefs.

We have not attempted to analyze in detail the numerous cases cited. We are referred to none which decide that the

business of a ferry company is commerce, within the meaning of the Federal Constitution, and unless we assume that there can be no question on that point, they are, for the most part, wholly inapplicable, or, at least, not decisive of this case.

If the business of ferriage is commerce, as defined by Chief Justice Marshall, we concede that any tax laid upon such business which comes within the ruling of the Passenger cases, or the State Freight Tax cases, or the many other cases involving the same principle, is an interference with commerce, and, for that reason, unconstitutional.

But if the tax is not of the nature indicated by those cases, or if a ferry business is rather in aid of commerce than commerce itself, or is subject to the same exactions in respect to taxation as foreign railroad and other corporations engaged in inter-State traffic, then we submit that the tax is not an interference with commerce, nor repugnant to the Federal Constitution, and the judgment of the Supreme Court of Pennsylvania should, consequently, be affirmed.

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